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Towards a Human-Centred International Law:

Self-Determination and the Structure of the
International Legal System

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Thesis submitted for the degree of
Doctor of Philosophy

Durham Law School
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Abstract

In recent years a number of scholars (most notably Anne Peters, Christian Tomuschat, Ruti Teitel and Antônio Augusto Cançado Trindade) have identified an ongoing process of change in the international legal system's relationship with individuals and groups of individuals. That change has been referred to as a *humanisation* of international law. This thesis contributes to that area of study by offering an account of the deep level changes to the foundations of the international legal system, which it argues are both driving and are recursively driven by changes in substantive international law. It finds the explanation for these changes in the idea of the self-determination of the individual, and it argues that this concept has now become a *structural principle* (a term borrowed from Giddens, 1984) of the international legal system.

The thesis takes a twin methodological approach to the question, using both an analysis of the history of ideas and a sociological lens (particularly Giddens's theory of structuration) to demonstrate that the foundations of the international legal order have changed through time, and that the operation and scope of the system's basic concepts has altered concomitantly. It argues that the institution of a principle of self-determination as the structural principle of the system is another such change, and one that will produce the kind of changes in the substance and operation of international law that have been identified by Peters and others. Its finding that the interests of individuals and of communities are now embedded in international law at the structural level strongly supports the conclusion that Peters and others have drawn from the examination of substantive international law, that there is a process of humanisation occurring, and that the humanisation process is occurring at all levels within the system.

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ACHPR	African Convention on Human and Peoples' Rights
ACoHPR	African Commission on Human and Peoples' Rights
GAOR	General Assembly Official Record
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ILC	International Law Commission
PCIJ	Permanent Court of International Justice
PMC	Permanent Mandates Commission
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
UNTS	United Nations Treaty Series
VCLT	Vienna Convention on the Law of Treaties

Introduction

*No permanence is ours; we are a wave
That flows to fit whatever form it finds:
Through day or night, cathedral or cave
We pass forever, craving form that binds.¹*

Contrary to the oft-heard pleas for stability in international affairs, the international legal system has not been—and, likely, is not—stable.² In his seminal *The Epochs of International Law* Grewe identifies at least six phases in the development of what is sometimes called “modern” international law: the Middle Ages; the Spanish, French and English ages, the inter-war period, and the United Nations era.³ These epochs were characterised not merely by changes in the dominant participants and the substantive rules of the system, but also of the system foundations themselves. Other scholars have similarly periodised the history of international law by means of its theoretical foundations, noting the dominance of cannon law, sacred and then secular (or semi-secular) natural law, and positivism as the underpinning

¹ Hermann Hesse, *The Glass Bead Game* (Richard Winston and Clara Winston trs, Henry Holt and Company 2002) 429.

² See e.g. Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Clarendon Press 1995) 56; Rosalyn Higgins, *The Development of International Law through the Political Organs of the United Nations* (Oxford University Press 1963) 104; James Crawford, *Brownlie’s Principles of Public International Law* (8th edn, Oxford University Press 2012) 439; Malcolm Shaw, *International Law* (7th edn, Cambridge University Press 2014) 155; Charles De Visscher, *Theory and Reality in Public International Law* (Percy Ellwood Corbett ed, revised, Princeton University Press 2015) 200. The International Court of Justice (ICJ) has also referred to the need to maintain stability on a number of occasions, most notably in relation to boundary delimitation: *Case Concerning the Temple of Preah Vihear (Cambodia v Thailand)*, Merits, Judgment of 15 June (1962), ICJ Reports 6, 34; *Agean Sea Continental Shelf*, Judgment, (1978) ICJ Reports 3, 36; *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment (1994) ICJ Reports 6, [72]; and also in relation to the formation of boundaries of post-colonial States: *Frontier Dispute (Burkina Faso/Republic of Mali)*, Judgment, (1986) ICJ Reports 554, [20, 25]; and in relation to treaty relations: *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, (1997) ICJ Reports 7, [104]. Stability was also cited in the context of the need to maintain stability of judgments in the Joint Dissenting Opinion of Vice President Yusuf and others in the Preliminary Objections phase of the *Question of the Delimitation of the Continental Shelf Between Nicaragua and Colombia Beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v Colombia)* of 17th March 2016. Stability is also cited as being ‘necessary for peaceful and friendly relations among nations’ in Article 55 of the Charter of the United Nations: Charter of the United Nations and Statute of the International Court of Justice, signed 24 October 1945, in force 24 October 1945.

³ Wilhelm G Grewe, *The Epochs of International Law* (Michael Byers tr, Walter de Gruyter 2000).

ideology of the international legal idea in different periods,⁴ and it may be—as Peters argues—that we have now stepped beyond the positivist era into a form of post-positivism (which she calls “neo-naturalism”).⁵

This thesis will more precisely identify and discuss that neo-natural shift. As Peters and others have described (discussed further below), international law is undergoing a series of changes which have far-reaching implications, and which have been described as a process of *humanisation*. This thesis will argue that those changes are not confined to the substantive international law, but rather are reflections of a deeper shift in the foundations of the system, which is both caused by and is recursively causing the reorientation of international law towards the human. That shift takes the form of a change in the international legal system’s structural principles⁶—or the deepest level concepts of the system, which ground and give shape to the concepts which rest upon them—and it will be argued that the self-determination of the individual is now a structural principle of the international legal order.

In order to assess that claim, the thesis adopts a two-part structure. In part one, two chapters are devoted to an examination of the development of self-determination as a substantive concept in international law, and to a determination of its current status. It will be argued that, in contrast to the unitary or binary conception of self-determination common in the literature, the idea of self-determination is composed of four different claims, each of which has a

⁴ Oliver Diggelmann, ‘The Periodization of the History of International Law’ in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of the History of International Law* (Oxford University Press 2012) 1001–02; Martti Koskeniemi, ‘A History of International Law Histories’ in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of the History of International Law* (Oxford University Press 2012); Bardo Fassbender and Anne Peters, ‘Introduction: Towards a Global History of International Law’ in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of the History of International Law* (Oxford University Press 2012).

⁵ Anne Peters, *Beyond Human Rights: The Legal Status of the Individual in International Law* (Jonathan Huston tr, Cambridge University Press 2016) 25.

⁶ The term is Giddens’s, and is discussed further below p.21 et seq.

different status in international law. One of these claims, that referred to as *political self-determination*, will be found to have attained a high status and a central position in the modern international legal system.

The second part of the thesis develops those conclusions through a discussion of the theory of international law and, in particular, the role individual and political self-determination play in influencing and shaping the development of five concepts which are identified as the *structural properties* of international law: sovereignty, obligation, statehood, personality, and *ius cogens*.⁷ It argues that the modern incarnations of these concepts find their roots in the self-determination and dignity of the individual (in some cases via political self-determination), and that the scope and operation of each is defined by that relationship. This finding that the interests of individuals and of communities are now embedded in international law at the structural level supports the conclusion that Peters and others have drawn from the examination of substantive international law, that there is a process of humanisation occurring at all levels within the system.

1. Towards a Human-Centred International Law

In his 1999 Hague lecture, Tomuschat noted a shift in the international legal system. It could no longer be said, he claimed, to be ‘based exclusively on State sovereignty.’⁸ Rather, certain basic values of the system had attained a protected status ‘derived from the notion that States are no more than instruments whose inherent function it is to serve the interests of their citizens as legally expressed in human rights.’⁹ These themes were foreshadowed in 1994 in Simma’s

⁷ See below p.23-25.

⁸ Christian Tomuschat, ‘International Law: Ensuring the Survival of Mankind on the Eve of a New Century’ (1999) 281 *Collected Courses of the Hague Academy of International Law* 9, 161.

⁹ *ibid* 162.

lectures for the Hague Academy, in which he argued that the shift from bilateralism to community interests—including the interests of human beings—is producing significant changes in international law,¹⁰ and the years that followed saw three further Hague Courses dedicated to the notion of human-centred international law, with Meron (in 2003) arguing that the international acceptance of human rights is producing a shift from State- to individual-centralism,¹¹ Cançado Trindade (in 2005) finding evidence of an ongoing humanisation of international law and enthusiastically supporting the notion;¹² and Hafner (in 2013) doubting that such a transformation is truly occurring.¹³ These views are representative of a wider split in the literature, with some authors supportive of the idea,¹⁴ while others have queried its applicability,¹⁵ or its usefulness.¹⁶

The humanisation of international law, it is argued by its proponents, is driven by changes in the ways in which the legal system at large reacts to the individual. For Tomuschat these changes are attributable to ‘a crawling process [...] through which human rights have steadily

¹⁰ Bruno Simma, ‘From Bilateralism to Community Interest in International Law’ (1994) 250 *Collected Courses of the Hague Academy of International Law* 217.

¹¹ Theodor Meron, ‘International Law in the Age of Human Rights’ (2003) 301 *Collected Courses of the Hague Academy of International Law* 1.

¹² Antônio Augusto Cançado Trindade, ‘International Law for Humankind: Towards a New *Jus Genitum* (I)’ (2005) 316 *Collected Courses of the Hague Academy of International Law* 9.

¹³ Gerhard Hafner, ‘The Emancipation of the Individual from the State under International Law’ (2013) 358 *Collected Courses of the Hague Academy of International Law* 263.

¹⁴ See, e.g. John King Gamble and others, ‘Human-Centric International Law: A Model and a Search for Empirical Indicators’ (2005–06) 14 *Tulane Journal of International and Comparative Law* 61; PK Menon, ‘The Legal Personality of Individuals’ (1994) 6 *Sri Lanka Journal of International Law* 127; Antonio Cassese, *The Human Dimension of International Law: Selected Papers* (Oxford University Press 2008); Andrea Bianchi, ‘Immunity versus Human Rights: The Pinochet Case’ (1999) 10 *European Journal of International Law* 237, 270–76.

¹⁵ See e.g. Emma Dunlop, ‘Reply to Anne Peters’ (2009) 20 *European Journal of International Law* 556.

¹⁶ Klaus Ferdinand Gärditz, ‘Bridge of Varvarin’ (2014) 108 *American Journal of International Law* 86, 91.

increased their weight, gaining momentum in comparison with State sovereignty'.¹⁷ Teitel casts a slightly wider net, arguing that in the post-Cold war period a triptych of factors—humanitarian, human rights, and international criminal law—has resulted in a deep structural change.¹⁸

The idea of the humanisation of international law has found perhaps its widest reaching and (in the present author's opinion) a highly convincing expression in the work of Anne Peters. Peters's scholarship on this subject is in two (main) parts, the first of which considered the impact of the idea of humanity (drawn more broadly than Tomuschat's or Meron's focus on human rights, but which retains human rights as a vital, central aspect) on sovereignty,¹⁹ and the second of which looked beyond both sovereignty and human rights in order to cast light on the many other areas of international law which show an increasing regard for individuals.²⁰ Peters describes an international legal system in which the individual is acknowledged as the "original" or "true" international legal subject,²¹ a position she recognises is inherently controversial,²² and most closely associated with a 'neo-natural law paradigm'.²³ Understanding, however, that the invocation of natural law 'hardly satisfies today's standards of intersubjective comprehensibility' she states her methodological intention to 'supplement[]' that paradigm with a rigorous treatment of the positive law.²⁴ She therefore

¹⁷ Tomuschat (n 8) 162. Meron also attributes the ongoing humanisation of international law primarily to the influence of human rights: Meron (n 11) 22 et seq.

¹⁸ Ruti Teitel, *Humanity's Law* (Oxford University Press 2011) 4. [Footnotes omitted].

¹⁹ Anne Peters, 'Humanity as the A and Ω of Sovereignty' (2009) 20 *European Journal of International Law* 513.

²⁰ Peters (n 5).

²¹ *ibid* 23–25, 408–35.

²² *ibid* 33–34.

²³ *ibid* 25.

²⁴ *ibid*.

conducts an extensive examination of international law practice and doctrine in order to support the contention that the role individuals play in international law is dramatically expanding, finding support in the ability of individuals to bear primary (substantive) obligations,²⁵ their ability to bear secondary (procedural) obligations,²⁶ and the ability of international norms to generate correlative rights for individuals;²⁷ as well as from a number of substantive areas of law: humanitarian law,²⁸ investment law,²⁹ consular law,³⁰ diplomatic protection,³¹ in the legal status of victims of crime,³² and in the protection of the individual from disasters.³³

In the author's opinion, *Beyond Human Rights* is a remarkable book, and one that makes a significant contribution to international law scholarship. Peters's study is impressive in its breadth, and its conclusions, overall, are highly convincing: although different strands of international law take account of the individual to different extents and in differing ways, individuals are now relevant persons in a great many fields of international law, without the mediating presence of the State. Although some will be inclined to dismiss her conclusions as utopian or failing to take account of the central legislative power (still) wielded by States,³⁴ overall Peters presents a compelling argument that the role of the individual in international

²⁵ *ibid* 60 *et seq.*

²⁶ *ibid* 115 *et seq.*

²⁷ *ibid* 167 *et seq.*

²⁸ *ibid* 194 *et seq.*

²⁹ *ibid* 282 *et seq.*

³⁰ *ibid* 348 *et seq.*

³¹ *ibid* 388 *et seq.*

³² *ibid* 255 *et seq.*

³³ *ibid* 233 *et seq.*

³⁴ Dunlop (n 15) 558.

law has significantly altered in a relatively short period of time. Peters's project is not complete, however, and in particular a theoretical explanation of the causes or the mechanism for the humanisation of international law which she identifies is conspicuous by its absence. It would however be unreasonable to criticise Peters for this omission, not least because its addition would have added considerably to an already very sizable project, but most particularly because it is consistent with her stated intention to identify whether and where a humanising trend may be observed in positive international law.

It is that question—the explanation of the causes and mechanisms of the humanising trend in the theory of international law—that this thesis will address. It will be argued that the trend that has been identified by Peters and others can be explained by a shift in the *structural principles*³⁵ which underpin the international legal system and which condition other concepts, and it will examine the proposition that self-determination is now a structural principle of international law. In seeking the source of the humanising tendency in international law at the theoretical level it will contribute to the development of scholarship in the field of human-centred international law, aiming to complement and build upon the analysis of the positive international law that has already been conducted.

2. The Idea of Self-Determination

In the course of the discussion this thesis makes use of certain key concepts, most notably *self-determination*, a form of which it argues is the driver of the humanisation process.

Self-determination is a concept which has a variety of different meanings in different contexts. The label is employed to assert a pre-constitutional right of the populations of States to

³⁵ This term is discussed below, p.21-25.

determine basic principles of their shared socio-political life (sometimes called popular sovereignty),³⁶ the right of States to govern themselves without outside interference,³⁷ to require the grant of independence to peoples under colonial rule,³⁸ and to justify the rights of groups to break away from a State.³⁹ This thesis presumes that although these forms of self-determination are separate and distinct (see chapter one⁴⁰), they nevertheless share a common root in a fifth homonym: personal self-determination. It will be argued that it is this idea—together with its collectivised expression of *political self-determination*—that is the structural principle of the international legal system, which shapes the structural properties and the subsidiary concepts that flow from it.

Personal self-determination may be defined as the contention that all individual human agents should have the opportunity (that is to say, the actualised right) to decide upon and to pursue their individual conception of the good.⁴¹ In other words, because human beings are ‘capable of forming and acting on intelligent conceptions of how their lives should be lived’, they should have the opportunity to live whatever form of life seems best to them.⁴²

³⁶ See, for example, American Declaration of Independence (1776), and discussion below p.41-45.

³⁷ See, for example, Declaration on Friendly Relations, annexed to UNGA Res 2526(XXV), 24 October 1970 and discussion below p.87-91.

³⁸ See, for example, UNGA Res 1514(XV), 20 December 1960 and discussion below p.83-85.

³⁹ See, for example, the examples of Norway and Quebec, discussed below p.52-62 and p.107-110 respectively.

⁴⁰ See below p.31 *et seq.*

⁴¹ Ronald Dworkin, *Taking Rights Seriously* (Gerald Duckworth & Co Ltd 2005) 272–73; Robert Nozick, *Anarchy, State and Utopia* (Basil Blackwell 1974) ix; Joseph Raz, ‘The Rule of Law and Its Virtue’ in *The Authority of Law: Essays on Law and Morality* (Clarendon Press 1979) 220.

⁴² Dworkin (n 41) 272–73.

That contention is inherently social, and is so for two reasons. It is, first, a concept which has application only in a social setting: a lone individual has no right to self-determination. Indeed, their self-determination is a meaningless concept, given that their capacity of action is both free from the constraint of any other will, and that it is vastly limited by the necessities of survival. This second is implicated, too, in the second social aspect of self-determination: that many of the goods which provide the individual the security of person and the freedom from need necessary to enable self-determination are best achieved socially, whether it be protection from the actions of others, or the pursuit of higher living standards through collective endeavour.⁴³ Social and political communities, therefore, whether formed incidentally to these needs or (*pace* Hobbes) in pursuit of them,⁴⁴ are themselves vehicles for the expression of individual self-determination.

The presence of the individual in a social setting gives meaning to the idea of self-determination, but it also presents challenges. Hobbes's famous warning that absent the regulation of violence human life would be 'solitary, poor, nasty, brutish, and short' presents a very bleak picture of humans, but one that is all too believable.⁴⁵ Although the idea of consistency (most authoritatively formulated, perhaps, by Kant in his *categorical imperative*⁴⁶) requires that each individual recognise and concede the same rights to others as they claim for themselves, it would be both naïve and contrary to historical experience to expect this principle of internal consistency alone to provide an adequate degree of assurance

⁴³ Richard E Leakey, *The Making of Mankind* (Book Club Associates 1981) 211. A similar observation can be seen in Durkheim, who notes that '[i]t is to society that we owe the[] varied benefits of civilisation [...] Man is human only because he is socialised': Emile Durkheim, 'Religion and Ritual' in Anthony Giddens (ed), *Emile Durkheim: Selected Writings* (Cambridge University Press 1972) 232.

⁴⁴ Thomas Hobbes, *Leviathan* (Richard Tuck ed, Cambridge University Press 1991).

⁴⁵ *ibid* §62.

⁴⁶ Immanuel Kant, *Groundwork for the Metaphysics of Morals* (Thomas E Hill Jr. and Arnulf Zweig eds, Arnulf Zweig tr, Oxford University Press 2002) 217; see also Christine M Korsgaard, *The Sources of Normativity* (Onora O'Neill ed, Cambridge University Press 1996) 136 et seq.

of the rights of individuals. Some form of social regulation and ordering—perhaps in the form of law, law-making and law enforcing institutions—may be posited, therefore, and that in turn implies a concept of *jurisdiction*.⁴⁷ In other words, the idea of social constraint implies and requires that it be possible to determine *to whom* the obligations of the system apply, and *how* and *where* an individual is entitled to claim the protection of them. It is to this idea that Kelsen refers in his description of law as a social technique: law applies to a particular society, and therefore requires an understanding of *membership* of a society – of who is, and who is not, a part of it.⁴⁸

The laws and socio-political institutions of a society are specific techniques whereby the freedom and well-being of individuals—that is to say, their self-determination—are preserved, maintained, and enhanced. The form that these institutions, and the wider social and political structures of the society, will take is dependent on the context and the particular needs of the individuals who comprise that society, and is the product of an ongoing process of choice of the form of socio-political organisation that best serves their needs. The self-determination of the individuals who compose a society—its members—is implicated in its forms and structures both in that it exists for and in order to protect them and their rights, and to the extent that the forms and structures of socio-political organisation that are in place are the expression of an ongoing collective choice.⁴⁹ It follows that to impose from outside a society a different choice (or to restrict its freedom of choice) would be to substitute the competence

⁴⁷ Jurisdiction is not, here, intended to convey the sense of jurisdiction *over territory*, but rather is used in the more nebulous sense of *sphere of application*.

⁴⁸ Hans Kelsen, *General Theory of Law and the State* (Anders Wedberg tr, Lawbook Exchange 1999) 19.

⁴⁹ That conclusion need not imply a democratic form of social order. As Waldron observes, the self-determination decision of ‘whether to have a democracy around here, and if so, what sort of democracy to have’ is necessarily prior to any particular form of social order: Jeremy Waldron, ‘Two Conceptions of Self-Determination’ in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (Oxford University Press 2010) 408.

of the members of society for that of non-members, and thus to sever the link between the society and the self-determination of its members.

In this way the self-determination rights of the individuals in a society aggregate and accrete to give rise to something of a different kind: a right of the society as a whole to pursue its internal socio-political life without the interference of those external to it.⁵⁰ In other words, it produces a right of the society to self-determine, which may be referred to as *political self-determination*. In its internal aspect this principle stands for the proposition (sometimes called popular sovereignty) that individuals are the source of legitimacy in a political constitution. In its external aspect it stands for the principle of non-interference; that it is for the community to determine and pursue its conception of the good, and that external interference is antithetical to that self-determination right.

As will be argued in Part One, this concept of political self-determination has been deeply embedded in the international legal system, particularly in the post-Charter era. It is this concept which, together with its root of personal self-determination, this thesis will argue should now be regarded as among the *structural principles* which shape the international legal system. These are not isolated concepts, however, and they form part of a broader “genus” of self-determination concepts, all of which find their root either directly, or via the idea of political self-determination, in personal self-determination. At least three further forms can be identified, all of which have relevance to the international legal system, and which have been accepted by the system to varying degrees: remedial, colonial, and secessionary self-

⁵⁰ This is understood here as a moral right. For a discussion of the transposition of this moral into a legal right see chapter 3, p.172-183.

determination. These forms and their relative legal statuses are discussed further in chapter one.⁵¹

3. Methodology

The task of the social sciences, according to Max Weber, is ‘the interpretive understanding of social action in order thereby to arrive at a [causal] explanation of its course and effects.’⁵² In order to undertake such an examination of the trend towards humanisation this thesis will adopt a twin methodological approach, employing both an historical analysis—and most particularly a *Begriffsgeschichte* (or “concept-history”) in Koskenniemi’s terms⁵³—and a sociological lens, most particularly Giddens’s theory of *structuration*. These techniques share a number of concerns. First, both are centrally concerned with agency, and seek to locate the actions, intentions and beliefs of agents within the study of social systems.⁵⁴ Each seeks, to use Weber’s terminology, *sinnhafte Adäquanz* (“adequacy on the level of meaning”);⁵⁵ or an understanding of what agents themselves recognise as the “typical” complex of meaning’ which attaches to actions and concepts in relevant social contexts.⁵⁶ This context is as vital in law as it is in any other social scientific setting. As Unger has reminded us, social institutions and structures like law are ‘made and imagined’,⁵⁷ a ‘frozen politics’,⁵⁸ created by, for, and

⁵¹ See below p.31 et seq.

⁵² Max Weber, *The Theory of Social and Economic Organization* (AM Henderson and Talcott Parsons trs, Free Press 1947) 88. A typographical error (or so I presume) in this edition renders the phrase ‘a *casual* explanation’.

⁵³ Koskenniemi (n 4) 968.

⁵⁴ Anthony Giddens, *The Constitution of Society: Outline of the Theory of Structuration* (Polity Press 1984) xx–xxi; Quentin Skinner, ‘Meaning and Understanding in the History of Ideas’ (1969) 8 *History and Theory* 3, 50–52.

⁵⁵ Weber (n 52) translators’ note 20.

⁵⁶ *ibid* 99.

⁵⁷ Roberto Mangabeira Unger, ‘The Critical Legal Studies Movement’ (1983) 96 *Harvard Law Review* 561, 665.

⁵⁸ *ibid* 649.

through the actions of social agents,⁵⁹ and its understanding therefore depends on adequately contextualising both the actions of agents in the past, and the ways in which the social and historical effects contemporary action.

Secondly, both highlight one element in particular; that of change. It was noted above that the international legal system has not remained stable through time. On the contrary, it has passed through at least six distinct epochs, in each of which the international legal system had a different structure, and was built upon different foundations.⁶⁰ Another such change is suggested here: the shift from positivism to “post-positivism”, “neo-naturalism”, or “human-centred international law”. The history of concepts is employed to understand the background to that shift, and why and how the ideas and concepts which are employed and discussed have come to bear their meanings and to occupy their positions in modern international law. Structuration theory is then applied in order to understand the mechanics of the changes which are occurring, and the theory also provides a background understanding of the international legal system as a social order which is subject to change.

The key benefit of the twin methodological approach adopted here is that it facilitates (and requires) a re-examination of certain orthodox positions through a re-reading of their history and social context. It shows that these concepts, in the form in which they are actually deployed in modern international law, have a far greater degree of complexity than is generally attributed to them, and it emphasises foundations as necessary socio-intellectual contexts within which concepts are seated. As foundations change so do concepts, and those

⁵⁹ This claim is defended in particular by Giddens, for which see discussion below at p.21-23.

⁶⁰ Grewe (n 3); see also Digglemann (n 4); Koskeniemi (n 4).

conceptual shifts can be used as mirrors to examine foundational change in action. It is that task that will be attempted here.

2.1 Historical

‘There is,’ Korhonen argues, ‘no way to understand and agree in the present without having some kind of narrative for how the present conditions and circumstances have come about.’⁶¹

History is a vital context in which the modern legal world is situated. This thesis seeks that contextualisation primarily in an examination of the history of the concepts of international law – a *Begriffsgeschichte*.

2.1.1 Begriffsgeschichte

Historical scholars of the Cambridge school have questioned the extent to which conceptual history can cross the temporal divide and generate insights into modern usages from historical applications of ideas and doctrines,⁶² but the study of legal history requires an exception to be made to the general condemnation of anachronism. While Skinner argues that history must live scrupulously within its own context—he declares that an examination of historical texts cannot provide us with answers to ‘our questions [...] but only with their own’⁶³—law’s character as a conceptual science, and one that is inherently backward-looking in its search for authority, has been highlighted by Orford as producing different needs.⁶⁴ Law’s concern with concepts which carry with them an intellectual history which is consciously or unconsciously invoked when the concept is applied requires a focus not only on historical

⁶¹ Outi Korhonen, ‘International Lawyer: Towards Conceptualization of the Changing World and Practice’ (2000) 2 *European Journal of Law Reform* 545, 555.

⁶² See generally Skinner (n 54) esp. 50.

⁶³ *ibid* 50.

⁶⁴ Anne Orford, ‘On International Legal Method’ (2013) 1 *London Review of International Law* 166, 170 et *seq.*

meaning—Skinner’s primary concern—but with *received meaning*.⁶⁵ Koskenniemi also appears to recognise this necessary anachronism in his call for a *Begriffsgeschichte*, or a conceptual history, of law. He argues that such an approach should

[T]ake the legal vocabularies and institutions as open-ended platforms on which contrasting meanings are to be projected at different periods, each complete in themselves, each devised so as to reach to some problem in the surrounding world. Its interest lies in meaning formation (“how does a particular concept receive *this* meaning?”) rather than the contents of any stable meaning per se.⁶⁶

Conceptual history of law not only facilitates understanding of the kinds of claims made by modern agents in their invocation of deep-rooted concepts, but it also focuses attention on change of meaning. To that extent, it is perhaps closer to the concerns of the Cambridge school than it might have at first appeared. Although it to some extent commits the ‘sin’ of producing ‘genealogic history from present to past [which] leads to anachronistic interpretations of historical phenomena,’⁶⁷ it nevertheless succeeds in highlighting that ‘those features of our own arrangements which we may be disposed to accept as traditional or even “timeless” truths may in fact be the merest contingencies of our peculiar history and social structure.’⁶⁸ Indeed, it is particularly well suited to that task, and will be employed here for that purpose.

More specific to the study of law still is the imperative recourse to history imposed by the structure of legal argument. Law is inherently a backward-looking enterprise which seeks authority for the regulation it imposes on its subjects in past acts, an aspect of its internal structure which may be seen particularly clearly in the concepts of enactment and precedent. The injunction that “like cases should be treated alike” and the conviction that retroactive

⁶⁵ *ibid* 175.

⁶⁶ Koskenniemi (n 4) 969.

⁶⁷ Randall Lesaffer, ‘International Law and Its History: The Story of an Unrequited Love’ in Matthew Craven and others (eds), *Time, History and International Law* (Martinus Nijhoff 2007) 34.

⁶⁸ Skinner (n 54) 52–53. [Footnotes omitted].

application of legal standards is (at least in normal cases) abusive—both cited as key elements of the rule of law, for example by Fuller⁶⁹—go beyond explicit appeal to past acts as justification for present action, and argue that law’s legitimacy is inherently historical. In the international legal world, the (at least partial) lack of constitutional, democratic or textual foundations creates a still-stronger pressure towards history as authority for current law. This is ‘a discipline in which judges, advocates, scholars and students all look to past texts precisely to discover the nature of present obligations’,⁷⁰ and as a result ‘[t]he past, far from being gone, is constantly being revived as a source or rationalisation for present obligation.’⁷¹ The key understanding here is not only that the necessary (if anachronic) task of the legal historian is to contextualise the concepts of the present in their (perhaps dis-)continuous intellectual history, but also the contextualisation of the endeavour itself. As lawyers studying history our concern is not, as Orford correctly notes, ‘with the past as history but with the past as law.’⁷²

2.1.2 Painted History

Nevertheless, that the task at hand is the study of the past as law does not free the enterprise from the dangers of subjectivism and reductionism that beset the study of history more broadly.⁷³ Seemingly innocuous decisions about the manner in which historical study is conducted can impose the subjectivity of the author onto the enterprise, and the truth of that observation can be seen even in the characterisation of historical time itself. As Digglemann notes, although the ‘division of historical time into periods is indispensable for any

⁶⁹ Lon Fuller, *The Morality of Law* (Yale University Press 1969) 46–49, 51–63.

⁷⁰ Orford (n 64) 171.

⁷¹ *ibid* 175.

⁷² *ibid* 177.

⁷³ And, indeed, as Bianchi highlights, other scholarly undertakings: Andrea Bianchi, ‘Reflexive Butterfly Catching: Insights from a Situated Catcher’ in Joost Pauwelyn and others (eds), *Informal International Lawmaking* (Oxford University Press 2012) 203–05.

historiographical work’,⁷⁴ it remains an inescapable truth that ‘[p]eriods are not facts.’⁷⁵ Rather, they are ‘interpretations of facts’.⁷⁶ Although they serve the necessary function of breaking the sweep of historical time into cognisable and intelligible sets of facts, events, and ideas with a (purported, at least) relevance to each other—of making ‘historical facts “thinkable”’⁷⁷—defining historical periods is never value-neutral.⁷⁸ The choice of the historian to work within a framework of international law ancient, medieval and modern, for example, or of the Spanish, French and British eras of international law (both of which Digglemann describes as “conventional” periodisations of international law)⁷⁹ inevitably colours the enquiry: it represents a choice as to what is and is not *relevant* in relation to the subject matter to be examined.⁸⁰

Like the division of history into units, the choice of approach to history is almost never unproblematic. While a realist history (or a history which focuses on the successive influences of different hegemonies) ‘dismisses religions, cultures and ideologies as well as the autonomy of legal institutions’,⁸¹ Koskenniemi argues, an *Ideengeschichte* (a history which takes as its reference points individual writers or approaches) ‘leaves untreated the history of “law” as the development of legal concepts, principles and institutions’.⁸² Both are reductive, the former overemphasising the hegemonic, and the second giving excessive weight to certain luminary

⁷⁴ Digglemann (n 4) 997.

⁷⁵ *ibid* 999.

⁷⁶ *ibid*.

⁷⁷ *ibid* 997, quoting Krzysztof Pomian, *L'ordre Du Temps* (Gallimard 1984) 162.

⁷⁸ Digglemann (n 4) 1001; Koskenniemi (n 4) 962 et seq.

⁷⁹ Digglemann (n 4) 1001–02.

⁸⁰ *ibid* 999–1001; Koskenniemi (n 4) 961–68.

⁸¹ Koskenniemi (n 4) 962.

⁸² *ibid* 968.

thinkers; and both consequently can have a tendency to be unduly homogenising, erasing dissenting voices. It is in this vein that Koskenniemi calls as an alternative for the *Begriffsgeschichte*—‘a conceptual history that examines changes in the meaning of legal concepts [...] or institutions’—discussed above, and it is this approach that is adopted here.⁸³

Nevertheless, such an approach is not without problems of its own. First, Koskenniemi observes that it must avoid the temptation to treat the evolution of a concept as being directional or having a destination. It must not ‘take[] the present concept or institution as a given and [...] reduce all prior history into the role of its “primitive” precursor.’⁸⁴

Secondly, it is important to remember that such a history is not free from the reductive and homogenising tendencies of the realist and doctrinal approaches. Like these, the selection of individual meanings for a concept cannot help but erase to some extent periods of transition between meanings, definitional uncertainty, regional variation, and meanings which (perhaps because they were short-lived, were contested, or were geographically limited) are deemed less important. Furthermore, it should be remembered that the search for meaning inevitably implicates realist (in the practice and *opinio iuris* of States and empires) and doctrinal approaches to some degree, and both in the balance between these approaches and in the examples selected choices must necessarily be made as to the relevant factors for assessing the meaning of the concept in time.

Korhonen has put forward a five-part critique of history, which she regards as having a ‘totalizing-tendency’ which ‘produce[s] manipulated appearances of reality while, in fact,

⁸³ See p.15.

⁸⁴ Koskenniemi (n 4) 969. This injunction certainly applies to self-determination. As Chadwick’s recent work has highlighted, the concept is still developing and, as she says, ‘more chapters will no doubt be added to [its] chronology’: Elizabeth Chadwick, *Self-Determination in the Post-9/11 Era* (Routledge 2011) 3.

alienating the observer and simplifying the links between motives, causes stakes and outcomes.’⁸⁵

First, it employs a number of techniques by which it creates “an effect” that *it is* the reality that it recounts not just a story about it. Second, it offers itself as the neutral “reality check.” Third, it externalises the past from the people whose past it is. Fourth, it persuades us not to look inside but outside ourselves for answers. Fifth, it presents the events of the world as snapshots which follow each other in an orderly fashion: to produce an historical account is to clean up the mess of convoluted and simultaneous “happenings.”⁸⁶

Nor, she argues, is the move from the comprehensive to the particular as the focus of international legal history a “cure” for the fallibilities of the undertaking.⁸⁷

There are, then, a number of apparently inescapable problems associated with the writing of history. Although scholars may strive to create a balanced and value-neutral account of the development of international law and international legal concepts, the ‘unavoidable subjectivity’ of the choices the author makes surrounding periodisation, delineation, in- or exclusion, and approach will inevitably skew the enterprise in ways which may be more or less obvious.⁸⁸ These concerns may not be “cure-able”, and they therefore pose the question of what the well-meaning scholar of international law should do. Should we—as Korhonen poses the question—“trash all history in and of international law?”⁸⁹

⁸⁵ Outi Korhonen, ‘The Role of History in International Law’ (2000) 94 Proceedings of the American Society of International Law 45, 46.

⁸⁶ *ibid.*

⁸⁷ *ibid.*

⁸⁸ Digglemann (n 4) 1001.

⁸⁹ Korhonen (n 85) 46.

She answers that we should not: we must have recourse to history.⁹⁰ It is precisely the simplifying and totalising aspects of history which—though problematic—‘are the means of making sense, finding a meaning, a red thread in the open and complex system that the world is. Without them we cannot reconcile past acts, arrive at conventions, or produce forgiveness, which law should do.’⁹¹ In this, Korhonen must be correct. It should be of no surprise that history—like all other methodological approaches—is unable to transcend its limitations, but it nevertheless remains a powerful tool for understanding and contextualising the modern world; so long as the “truth” of its conclusions are treated with a proper degree of scepticism. ‘No-one’, to use Korhonen’s apt phrase, ‘is a photographer of history’:⁹² rather when projecting an image of history our subjective starting-points and decisions will determine the contours of the product. If a photograph is an accurate record, the painting says as much about the artist as it does about the scenery.

What is left, then, is to have recourse to history, but to do so with the eyes wide open. Digglemann argues that the ‘diligent intellectual has to admit the unavoidable subjectivity of [their] periodization decisions’,⁹³ and this injunction is interpreted here in the active form: that it is preferable for the writer of history baldly to express the approach they have taken to the enterprise, and the purpose for which they have done so. For this reason these will be briefly set out at the major points where a historical methodology is employed.

⁹⁰ Korhonen (n 61) 555.

⁹¹ Korhonen (n 85) 46.

⁹² Korhonen (n 61) 555.

⁹³ Digglemann (n 4) 1001.

2.2 Sociological

In parallel with its use of history, this thesis will also look to sociology in order to show the interactions between self-determination and the key concepts of international law, and in particular will employ Anthony Giddens's theory of *structuration*.

2.2.1 Structuration Theory

The theory of structuration is given its fullest expression in Giddens's 1984 monograph *The Constitution of Society*. There Giddens seeks to reconcile 'the conceptual divide between subject and social object', and to recast that 'dualism' as a 'duality'.⁹⁴ In contrast both to schools of thought which cast societies as structures which have effects on individuals, and approaches which reduce all of social life to individual interaction, Giddens locates human agency at the heart of social ordering, and in so doing he emphasises the two-way, or *recursive*, relationship that exists between social form and social action.⁹⁵

Human social activities, like some self-reproducing items in nature, are recursive. That is to say, they are not brought into being by social actors but continually recreated by them via the very means whereby they express themselves as actors. *In and through their activities agents reproduce the conditions that make these activities possible.*⁹⁶

In so doing, the theory of structuration has drawn attention to the malleability of social systems,⁹⁷ and it criticises in particular the tendency of social theory to 'think in terms of physical imagery [...] like the walls of a building or the skeleton of a body. This is misleading because it implies too static or unchanging an image of what societies are like'.⁹⁸

⁹⁴ Giddens (n 54) xx–xxi.

⁹⁵ *ibid* xxiii.

⁹⁶ *ibid* 2. [My emphasis].

⁹⁷ Giddens (n 54).

⁹⁸ Anthony Giddens, *Sociology: A Brief but Critical Introduction* (MacMillan Press 1982) 14.

It is for this reason that Giddens criticises “structure” as a metaphor for societies and social phenomena.⁹⁹ These metaphors imply a permanence and a rigidity that he regards as unwarranted, as well as a skeletal function whereby the patterns of social life are constrained by forms without any reverse interaction. Nevertheless, structuration theory does not dispense with the idea of structure altogether.

In analysing social relations we have to acknowledge both a syntagmatic dimension, the patterning of social relations in time-space involving the reproduction of situated practices, and a paradigmatic dimension, involving a virtual order of “modes of structuring” recursively implicated in such reproduction. [...] Structure thus refers, in social analysis, to the *structuring properties* allowing the “binding” of time-space in social systems, the properties of which make it possible for discernibly similar social practices to exist across varying spans of time and space and which lend them “systemic” form.¹⁰⁰

Giddens refers to the ‘most deeply embedded structural properties’ of a given social system as *structural principles*.¹⁰¹

Structural properties, then—and the most basic of them, the structural principles—are the concepts, ideas and functions which give shape to social systems and which create patterns of social behaviour. They are, though, still themselves shaped by that behaviour in the process of recursive creation and recreation Giddens describes. Far from thinking about the study of social systems as the exploration of a house—where we may find and unlock the door that leads to the foundations, thence to “discover” the “true” basis of the system—we need rather to be aware that ‘social systems are like buildings that are at every moment constantly being reconstructed by the very bricks that compose them.’¹⁰² That change does not, however, take place in any directed sense; the recreation of social structures is not (by and large) subject to

⁹⁹ Giddens (n 54) 16.

¹⁰⁰ *ibid* 17. [My emphasis].

¹⁰¹ *ibid* 17, 180–93.

¹⁰² Giddens (n 98) 14. [Emphasis removed].

a controlling influence or will. Rather it responds to the *expectations of reality* that individuals in and interacting with the system hold.

It is this malleability that gives study of the structural principles and structural properties of social systems power as an explanatory framework for analysis of social change. Although their “embeddedness” means that change in the system principles and properties would generally be expected to take place slowly and incrementally, there nevertheless remains the potential for a shift in behaviours and—crucially—in *actors’ expectations of what the social reality is* to effect much more dramatic changes. That these changes are recursive, too, means that such changes would be expected to have effects felt throughout the system: while behaviours, actions and the operation of system concepts shape the social structures, so social structures shape those behaviours, actions and concepts in parallel. It is a change of this kind, in the structural principles of international law, that has been referred to above. This thesis will argue that self-determination is now one of those structural principles, and that its influence in shaping and conditioning the structural properties and the other concepts of the international legal system is a major driver in the ongoing process of humanisation of international law.

2.2.2 *The Structural Properties of the International Legal System*

The identification of the structural properties which shape international society and (in particular) international law is a potentially never-ending task. Unger argues that it is not possible ever fully to capture ‘a definitive structure because no arrangement of society and of culture can ever do justice to who we are, to our powers of experience, of insight, of production, of association.’¹⁰³ Although this is very likely true—social systems in their vast

¹⁰³ Nigel Warburton, Interview with Roberto Mangabeira Unger, ‘Roberto Mangabeira Unger on What is Wrong with the Social Sciences Today - SocialScienceBites’ (January 2014).

and ever-changing complexity would perhaps render even an exhaustive account reductive—law is perhaps the form of social interaction that is, to the greatest extent, institutionalised. Unger describes institutional structures in society as ‘a kind of frozen politics’, and legal systems could be argued, then, to be those social systems in the deepest freeze.¹⁰⁴ Although such an account will only ever be schematic, it is nevertheless worth the effort of attempting, and will be undertaken here by means of a thought experiment.

Let us attempt to derive the international legal system as it currently exists from scratch. Such a task is, of course, impossible: as the methodological discussion above indicates, the present author begins from the presumption that the international legal system is a historical contingency—one which has arisen primarily as a result of historical dominance of European nation-States and of the imposition through the colonial experience of the ideas which sustain them onto the rest of the world¹⁰⁵—constructed as a result of the conscious and unconscious actions of individuals and groups, and that the forms and structures of integration which may be found therein are not (or, perhaps more accurately, are not necessarily) expressions of necessity, inevitability, morality or transcendentalism. For that reason, one would need a vast amount of information about the historical and current orderings of the international community, the relative positions of States and peoples, the great events which have shaped the consciousness of the world, and the values held by individuals and States at different points in time in order even to attempt it. The task can be simplified, however: leave aside all substantive rules and institutional organisation, and let us attempt to arrive merely at the structural elements of the system. Although this, too, is a daunting task, unlike the first it is suggested that it would be possible to arrive at something which at least approximates the

¹⁰⁴ *ibid.*

¹⁰⁵ On the influence of colonialism on the development of international law see, in particular, Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2004); Lauren Benton and Lisa Ford, *Rage for Order: The British Empire and the Origins of International Law 1800-1850* (Harvard University Press 2016).

structure of the international legal system as it currently exists if given a select few postulated propositions. This position is not intended to deny that the form of the system is historically contingent, and still less to suggest that the system's postulates are inevitable, necessary, right, or immutable. On the contrary, 'the arrangements of society – the regime of society – is not a natural phenomenon; it is made and imagined.'¹⁰⁶ Rather a descriptive point is made: it is submitted that certain system postulates, once they are instituted by social and historical forces, dictate the *subsequent* shape of the system, and that given an adequate understanding of these core concepts, therefore, a schematic outline of the modern international legal system may be drawn. Those concepts are sovereignty, obligation, statehood, personality, and *ius cogens*.

These are, I submit, (at least some of) the *structural properties* of modern international law. In other words, these are '[i]nstitutionalized features of [the] social system, stretching across time and space', which serve to condition and shape the system as a whole.¹⁰⁷ It is to these concepts that this thesis will refer in the course of the argument, in order to demonstrate that self-determination now occupies the position of a *structural principle* of the international legal system, and that its influence is resulting in a refocusing of these concepts and the wider system. A human-centred international law is emerging.

4. The Argument

Structural principles are not immune from change. Indeed, far from it: that is a vital aspect of Giddens's thesis.¹⁰⁸ They may evolve and shift in response to the perceptions and

¹⁰⁶ Unger interview (n 103). A similar point is made by Unger in (n 57) 649.

¹⁰⁷ Giddens (n 54) 185.

¹⁰⁸ *ibid* 2–3.

expectations of reality of the individuals within the system, in a process Giddens describes as *recursive social activity*. But because structural principles are so deeply embedded in the fabric of the social order, their evolution or the migration of one structural principle to another can entail significant changes to the structure of the system as a whole. Although it will not seek to pin down the moment—if such there be—at which this change occurred, this thesis will seek to show that the structural principles on which the international legal order is based have shifted, and that self-determination now sits among them.

The argument that the humanising trend is explicable by a shift in the system principles faces, of course, a challenge, in that the principles of the international legal system are not immediately accessible for inspection. Rather, those principles must be sought indirectly, in the effects that are produced in other areas and, in particular, in its structural properties – the second order concepts of the international legal system. This thesis will therefore take the form of the proposition and examination of a hypothesis: that the idea of self-determination (meaning, in particular, the closely connected concepts of personal and political self-determination) has grown to be deeply embedded in the structure of the international legal system—and especially so in the post-Charter era—and that it is a structural principle of the international legal system.¹⁰⁹ In other words, it is the hypothesis of this thesis that self-determination sits at a high level within the conceptual hierarchy of the international legal order, and that it shapes and conditions the concepts that sit below it in that hierarchy. The humanisation of international law is both driving and being driven by that foundational change.

¹⁰⁹ *ibid* 17.

In order to test that hypothesis, this thesis will examine certain of the vital concepts—the structural properties—of the international legal system: sovereignty, obligation, statehood, personality, and *ius cogens*.¹¹⁰ It will argue that these concepts, in their modern form, are conditioned by and structured according to self-determination, both in themselves and in the ways in which they interact. If the hypothesis is borne out, the treatment of these concepts in everyday international law questions will need to be reassessed. In particular, scholars, jurists and practitioners will need to be aware that the 19th and 20th century incarnations of these ideas may no longer be appropriate. There will have been, in Kuhn's terms, a shift in paradigm towards a human-centred international legal system.¹¹¹

The argument of the thesis is divided into two parts. In part one the position of self-determination in substantive international law is examined in order to demonstrate, in particular, the central importance modern international law places upon the collectivised expression of self-determination by socio-political communities, which is referred to here as *political self-determination*. Chapter one of the thesis traces the development of self-determination as a substantive norm through its most significant historical instances to the documentary practice of the United Nations. It distinguishes between four forms of the concept—political, colonial, remedial and secessionary self-determination—and argues that they have to differing degrees been accepted by international law. Chapter two continues this examination through the judicial treatments of self-determination, primarily in international courts. These chapters will show that political self-determination is a deeply embedded principle of the post-charter legal order. Colonial self-determination, too, has come to be accepted in international law, although its acceptance is based primarily on the political conviction that colonial rule can no longer be accepted as justified or justifiable. Remedial

¹¹⁰ See above p.23-25.

¹¹¹ Thomas S Kuhn, *The Structure of Scientific Revolutions* (3rd edn, University of Chicago Press 2009).

and secessionary self-determination, by contrast, are far more controversial, raising as they do the spectre of territorially concentrated minorities seeking to break away from established States. It will be argued, however, that although secessionary self-determination remains a political demand rather than a legal right under international law, that remedial self-determination has attained at least a measure of acceptance, largely as a result of its necessary connection to the idea of political self-determination.

In part two the thesis begins the task of analysing the central concepts of international law, in order to determine whether these concepts have a connection to self-determination. Chapter three begins by examining sovereignty and obligation. The story of international law has been one of attempting to balance these two (apparently) irreconcilable concepts. After all, if a State is sovereign (meaning that no power sits above it), then it cannot be compelled to comply with the rules of international law – up to and including the rule *pacta sunt servanda*. The histories of these concepts will be explored, in order to ascertain how this conflict was viewed under different international legal frameworks before turning to a theoretical analysis of the role they play in the modern legal order. It will be argued that the modern incarnations of both concepts find their roots in self-determination, and that they do not (or perhaps that they no longer) conflict.

Chapter four examines another pair of closely connected concepts: statehood and personality. These will be examined with a particular emphasis on the personality of States, in order to demonstrate that States, far from being the “sole”, “original”, or “natural” persons of international law are given life by individuals, and exist as “true” persons only insofar as they express a collective personality of the individuals who comprise them. It will be argued that the process of State creation should be regarded as two stages, each involving elements of self-determination. In the first stage a group of individuals combines into a political

community, which is referred to here as the State(Polity). In the second stage a State(Polity) develops the institutional mechanisms necessary for it to exist as an entity in itself on the international plane. This second coextensive entity is referred to here as the State(Person).

Chapter five examines the concept of *ius cogens*. Here, too, it will be argued that there is a vital and necessary connection to self-determination, and it will be argued that both the overarching concept and (albeit less directly) the substantive content of the norms themselves are expressions of the necessity of protecting the personal and collectivised self-determination of the individuals who sit at the heart of the international legal system. The link between self-determination and the substantive provisions of *ius cogens* is not straightforward, however, and will be examined by means of a test case, the prohibition of impoverishment; a norm the peremptory status of which would amply be justified by its connection to self-determination, but which does not appear to have received international recognition as a *ius cogens* prohibition. It will be concluded that although the concept is grounded in self-determination and that self-determination concerns are predominantly those expressed in the substantive norms which attain *ius cogens* status, the grant of peremptory status is still mitigated by the positive law and that self-determination concerns do not, therefore, automatically or directly result in the recognition of a peremptory norm.

Finally, the conclusion will draw together the threads from these chapters, and will examine to what extent it may be said that the hypothesis has been sustained. It will be concluded that the deep connections shown between the concepts examined and self-determination indicate that self-determination now occupies a position in international law which would be consistent with the hypothesis given here, and that its influence is reorienting international law towards the human.

Part One

Part one of the thesis begins the process of examining the hypothesis that self-determination has been instituted as the structural principle of international law by examining the position of the concept in substantive international law. In chapter one, the international law concept is sub-divided into four norms; political, colonial, remedial and secessionary self-determination. These are characterised as not being aspects or facets of a single concept, but rather as a genus of connected but distinct ideas. That typology is employed in the chapter in order to clarify the development of self-determination through its major invocations, a process which demonstrates that the four-part taxonomy is more successful at clarifying the status of the concept than the standard internal/external dichotomy. Chapter two then considers the implementation and development of the four norms of self-determination in judicial fora. A line of cases from the International Court of Justice is considered, together with the decision of the African Court on Human and Peoples' Rights in *Katanga*, and the Opinion of the Supreme Court of Canada in *Quebec*. The chapter concludes with an extended discussion of the *Kosovo* Advisory Opinion of the ICJ.

Taken together, these chapters show self-determination to be a composite of four ideas of different legal status, and the four-part taxonomy of self-determination is employed to explain the significantly different treatment of these close homonyms by international law. Of most significance for this thesis, however, they reveal political self-determination—the form of the norm associated with the rights of political communities to independence and non-interference—has achieved a high status in international law and has been embedded in the international legal system. Part two then considers whether it can be said to have been instituted as the structural principle of the system.

One

Self-Determination I: Evolution and Taxonomy of a Genus

Granted, there is always much that is hidden, and we must not forget that the writing of history—however dryly it is done and however sincere the desire for objectivity—remains literature. History's third dimension is always fiction.¹

1. Introduction

Self-determination is an idea of undeniable power. To proponents of its application and extension it is an emancipatory principle: a tool with the potential to realise self-rule, political empowerment, and the application of human rights standards.² For others it is a dangerous concept: a centrifuge with the potential to pull apart the international system and the relative peace that is built upon it. Suggestions that its application be extended attract apocalyptic predictions for affected populations and international legal order.³ Its violent history cannot be denied; Duursma has observed that ‘practically all’ armed conflicts relate to the exercise

¹ Hermann Hesse, *The Glass Bead Game* (Richard Winston and Clara Winston trs, Henry Holt and Company 2002) 48.

² See e.g. Guyora Binder, ‘The Case for Self-Determination’ in Robert McCorquodale (ed), *Self-Determination in International Law* (Ashgate Dartmouth 2000) 141 et seq; Daniel Philpott, ‘In Defense of Self-Determination’ (1995) 105(2) *Ethics* 352; Daniel Philpott, ‘Self-Determination in Practice’ in Margaret Moore (ed), *National Self-Determination and Secession* (Oxford University Press 1998); David Copp, ‘Democracy and Communal Self-Determination’ in Jeff McMahan and Robert McKim (eds), *The Morality of Nationalism* (Oxford University Press 1997); Fernando R Tesón, ‘Introduction: The Conundrum of Self-Determination’ in Fernando R Tesón (ed), *The Theory of Self-Determination* (Cambridge University Press 2016) 8 et seq; Dov Ronen, *The Quest for Self-Determination* (Yale University Press 1979).

³ See e.g. Rosalyn Higgins, *The Development of International Law through the Political Organs of the United Nations* (Oxford University Press 1963) 104; Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge University Press 1995) 328; Lee Buchheit, *Secession: The Legitimacy of Self-Determination* (Yale University Press 1978) *passim*; Allen Buchanan, ‘Democracy and Secession’ in Margaret Moore (ed), *National Self-Determination and Secession* (Oxford University Press 1998) 14 et seq.

of self-determination.⁴ Despite this, the International Court of Justice (ICJ) has declared the right of peoples to self-determination ‘one of the essential principles of international law’, that it is a norm of *erga omnes* character, and that it is ‘one of the essential principles of contemporary international law.’⁵ Cassese goes further, concluding that self-determination has acquired *ius cogens* status.⁶

The “Jekyll and Hyde” character of self-determination is just one of the intriguing questions bound up with this complex concept.⁷ Few other principles in international legal affairs are so uncertain or contested.⁸ There is a continuing and significant disconnection between the right of self-determination as commonly understood by those invoking the idea (often in pursuit of secession), and the panoply of references in legal texts and judicial decisions to the

⁴ Jorri Duursma, *Fragmentation and the International Relations of Micro-States: Self-Determination and Statehood* (Cambridge University Press 1996) 1; see also Philpott, ‘Self-Determination in Practice’ (n 2) 79; Tesón (n 2) 8.

⁵ *East Timor (Portugal v Australia)*, Judgment, (1995) ICJ Reports 90, [29].

⁶ Cassese (n 3) 140; see also Alain Pellet, ‘Kosovo - The Questions Not Asked: Self-Determination, Secession, and Recognition’ in Marko Milanović and Michael Wood (eds), *The Law and Politics of the Kosovo Advisory Opinion* (Oxford University Press 2015) 272; Alexander Orakhelashvili, *Peremptory Norms in International Law* (Oxford University Press 2006) 51–53; Lauri Hannikainen, *Peremptory Norms (Jus Cogens) in International Law: Historical Development, Criteria, Present Status* (Finnish Lawyers Publishing Company 1988) 381–84.

⁷ Mégret, for example, describes ‘[i]nternational law’s attitude to self-determination [as having] oscillated in the last century between the temptation of encouraging group aspirations to forms of political and territorial power and a recoiling at the possible consequences for international order and stability.’ Frédéric Mégret, ‘The Right to Self-Determination: Earned, Not Inherent’ in Fernando R Tesón (ed), *The Theory of Self-Determination* (Cambridge University Press 2016) 48.

⁸ Tesón declares that ‘[n]o other area of international law is more indeterminate, incoherent, and unprincipled than the law of self-determination.’ Tesón (n 2) 1.

‘right’ of self-determination (mainly references to “internal” self-determination).⁹ The result is a legal norm of self-determination of uncertain scope, application, and result.¹⁰

This chapter will distinguish between four forms of the concept of self-determination—political, colonial, remedial and secessionary—each of which is ultimately derived from the individual right of personal self-determination, but which are sufficiently different to each other in their historical and ideational foundations to be considered distinct species within a self-determination *genus*, and not different applications of the same legal norm. It will trace the development of the self-determination idea through its major applications to show that self-determination claims can usually be characterised as referring to one or other of these forms, and that the different forms have been accepted by international law to differing degrees. It will be argued that while secessionary self-determination has not been generally accepted in international law, other forms have been more favourably received: colonial self-determination has been widely recognised and implemented—few now would deny the right of colonial peoples freely to choose whether or not to remain subject to colonial sovereignty—and there are some indications that the remedial form may increasingly be seen as acceptable. Most significantly, it is clear that the political form of self-determination is now deeply embedded in the international legal system, and is widely seen as one of the international legal order’s most fundamental principles.

This chapter will trace the development of the various forms of self-determination from their first international appearances (in the American and French revolutions of 1776 and 1789) to

⁹ See, e.g. *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, (1971) ICJ Reports 16; *Western Sahara*, Advisory Opinion, (1975) ICJ Reports 12; *East Timor* (n 5); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, (2004) ICJ Reports 136.

¹⁰ Tesón (n 2) 1–2.

the decolonisation practice of the League of Nations and the United Nations, and the broader development of the idea in the practice of the General Assembly. Chapter two will then look at the judicial treatment of self-determination in the United Nations era, and will discuss recent developments.

1.1 The Self-Determination Genus: Definitions

Many of self-determination's contradictions can be attributed to problems of definition. In international law self-determination is often understood to be a unitary concept.¹¹ By contrast it will be argued here that this conflates its forms, and thus impedes their analysis. Such a view of self-determination produces (even to a greater extent than is warranted) histories

¹¹ See, e.g. Cassese (n 3) 11–33; Jens David Ohlin, 'The Right to Exist and the Right to Resist' in Fernando R Tesón (ed), *The Theory of Self-Determination* (Cambridge University Press 2016) *passim*; Patrick Macklem, 'Self-Determination in Three Movements' in Fernando R Tesón (ed), *The Theory of Self-Determination* (Cambridge University Press 2016) 95; Elizabeth Rodríguez-Santiago, 'The Evolution of Self-Determination of Peoples in International Law' in Fernando R Tesón (ed), *The Theory of Self-Determination* (Cambridge University Press 2016); Duncan French, 'Introduction' in Duncan French (ed), *Statehood and Self-Determination: Reconciling Tradition and Modernity in International Law* (Cambridge University Press 2013) 11; Jure Vidmar, 'Unilateral Declarations of Independence in International Law' in Duncan French (ed), *Statehood and Self-Determination: Reconciling Tradition and Modernity in International Law* (Cambridge University Press 2013) 71–73; Katherine del Mar, 'The Myth of Remedial Secession' in Duncan French (ed), *Statehood and Self-Determination: Reconciling Tradition and Modernity in International Law* (Cambridge University Press 2013) *passim*; Mégret (n 7) 48–54; Anthony Whelan, 'Self-Determination and Decolonisation: Foundations for the Future' (1992) 3 *Irish Studies in International Affairs* 25; Snežana Trifunovska, 'One Theme in Two Variations - Self-Determination for Minorities and Indigenous Groups' (1997) 5 *International Journal on Minority and Group Rights* 175; Patrick Thornberry, 'The Democratic or Internal Aspect of Self-Determination with Some Remarks on Federalism' in Christian Tomuschat (ed), *The Modern Law of Self-Determination* (Martinus Nijhoff 1993); James Crawford, 'Outside the Colonial Context' in WJ Allan Macartney (ed), *Self-Determination in the Commonwealth* (Aberdeen University Press 1988) 13; Elizabeth Chadwick, *Self-Determination in the Post-9/11 Era* (Routledge 2011) 7–8; Christian Walter and Antje von Ungern-Sternberg, 'Introduction: Self-Determination and Secession in International Law—Perspectives and Trends with Particular Focus on the Commonwealth of Independent States' in Christian Walter and others (eds), *Self-Determination and Secession in International Law* (Oxford University Press 2014) 2; Philpott, 'Self-Determination in Practice' (n 2) 85–86; Rupert Emerson, 'Self-Determination' (1971) 65 *American Journal of International Law* 459; Nathaniel Berman, 'Sovereignty in Abeyance: Self-Determination and International Law' (1988) 7 *Wisconsin International Law Journal* 51; Binder (n 2); Hurst Hannum, 'Rethinking Self-Determination' (1993) 34 *Virginia Journal of International Law* 1.

which show its development to have been chaotic, and legal analyses which show its status to be at best indeterminate.¹²

Many modern discussions of self-determination use the vocabulary “external” and “internal” in describing the concept.¹³ Summers argues that this vocabulary is ‘now almost standard practice in the academic literature,’¹⁴ even if (a fact which calls into question its usefulness) there is no universal agreement on to what the terms refer.¹⁵ In general, these terms seem to be taken to refer, on the one hand, to the determination by the whole populations of existing

¹² There are other, and more potentially serious, consequences of this false conflation, too, than its impediment of academic understanding of the idea. As Mégret notes, the endorsement by the international community of self-determination in the colonial context was seen by some as an affirmation of a broader right to secede, and ‘[t]hose who took the principle too literally, from Katanga to Biafra, learned their lesson painfully.’ Mégret (n 7) 50.

¹³ See e.g. James Summers, ‘The Internal and External Aspects of Self-Determination Reconsidered’ in Duncan French (ed), *Statehood and Self-Determination: Reconciling Tradition and Modernity in International Law* (Cambridge University Press 2013) *passim*; Cassese (n 3); Salvatore Senese, ‘External and Internal Self-Determination’ (1989) 16 *Social Justice* 19; Duursma (n 4); Rodríguez-Santiago (n 11) 202 *et seq*; Vidmar (n 11) 71–73; del Mar (n 11) 79 *et seq*; David Raič, *Statehood and the Law of Self-Determination* (Kluwer Law International 2002) 226–307; Robert McCorquodale, ‘Self-Determination: A Human Rights Approach’ (1994) 43 *The International and Comparative Law Quarterly* 857; Margaret Moore, ‘Introduction: The Self-Determination Principle and the Ethics of Secession’ in Margaret Moore (ed), *National Self-Determination and Secession* (Oxford University Press 1998); Helen Quane, ‘The United Nations and the Evolving Right to Self-Determination’ (1998) 47 *International and Comparative Law Quarterly* 537; Jan Klabbers, ‘The Right to Be Taken Seriously: Self-Determination in International Law’ (2006) 28 *Human Rights Quarterly* 186; Howard R Berman and others, ‘Indigenous Peoples and the Right to Self-Determination’ (1993) 87 *Proceedings of the Annual Meeting of the American Society of International Law* 190; David B Knight, ‘Territory and People or People and Territory? Thoughts on Postcolonial Self-Determination’ (1985) 6 *International Political Science Review* 248; Whelan (n 11); Emerson (n 11) 465–66; Kelly Strathopoulou, ‘Self-Determination, Peacemaking and Peace-Building: Recent Trends in African Intrastate Peace Agreements’ in Duncan French (ed), *Statehood and Self-Determination: Reconciling Tradition and Modernity in International Law* (Cambridge University Press 2013) 283–85; Trifunovska (n 11).; Cristescu, *The Right to Self-Determination: historical and current development of the basis of United Nations Instruments*, Report of the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, E/CN.4/Sub.2/404/Rev.1, p.5, *passim*. The internal/external classification was also discussed in some detail and employed by the Supreme Court of Canada in its decision in *Reference Re Secession of Quebec*. See *Reference Re Secession of Quebec* [1998] 2 SCR 217, [126] *et seq*, and discussion in chapter two.

¹⁴ Summers (n 13) 230.

¹⁵ “Internal” and “external” do not appear to bear the same meanings in the work of all authors. Compare, for example, Whelan, who uses the term “external” to mean “non-intervention” (Whelan (n 11) 37), with McCorquodale, who uses the term to refer to secessions (McCorquodale (n 13) 863–64). This section takes “internal” to mean self-determination by the whole people of a State within its established borders, and “external” to mean the secession of a sub-State unit, which appear to be the modal usages of these terms.

States of their political systems (“internal”),¹⁶ and on the other to the autonomy or secession demands of sub-State national groups (“external”).¹⁷ Yet although these are very different ideas (“internal” speaks of the legitimacy of governments,¹⁸ “external” of the legitimacy of borders;¹⁹ “internal” is often portrayed as progressive and democratic,²⁰ while “external” is seen as nationalistic and parochial²¹) they are often understood to be two sides of the same unitary idea.²² Viewed in this way, self-determination is a single norm which has different effects and outcomes depending on the circumstances in which it is applied.²³

Such a view of self-determination is oversimplified and constrictive. As Waldron has observed, the two forms of self-determination he identifies (which he names ‘territorial self-determination’ and ‘identity-based self-determination’, although they align closely with “internal” and “external” as commonly used elsewhere)²⁴ apply to different groups, and make entirely different claims.²⁵ Territorial self-determination takes place within pre-drawn boundaries, and relates to the freedom of the people of a State to decide the form of their government without external interference, while the identity-based form relates to the

¹⁶ Summers (n 13) 253–242; Klabbers (n 13).

¹⁷ Trifunovska (n 11); McCorquodale (n 13) 863–64.

¹⁸ Allan Rosas, ‘Internal Self-Determination’ in Christian Tomuschat (ed), *Modern Law of Self-Determination* (Kluwer Law International 1993) 230; Thornberry (n 11) 101; Duursma (n 4) 7; Cassese (n 3) 5.

¹⁹ Raič (n 13) 181; Cassese (n 3) 5.

²⁰ Klabbers (n 13); Cassese (n 3) 350.

²¹ Buchheit (n 3) 28–31; Tesón (n 2) 8 et seq; Amitai Etzioni, ‘The Evils of Self-Determination’ (1992–93) 89 *Foreign Policy* 21, *passim*.

²² Senese, for example, describes them as ‘two inseparable aspects of the same principle’: Senese (n 13) 19; see also Duursma (n 4) 78–80; Trifunovska (n 11); Tesón (n 2) 8–11.

²³ Duursma (n 4) 78–80.

²⁴ Jeremy Waldron, ‘Two Conceptions of Self-Determination’ in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (Oxford University Press 2010) 397–98.

²⁵ *ibid* 401–13.

determination by a ‘people’ (howsoever defined) whether or not to remain a part of a larger entity. The former is a political ideal similar to (although distinct from) democracy.²⁶ The latter is a right to secede. Far from being aspects of the same overarching idea, however, he argues that it would be possible to ‘abandon’ entirely the latter and yet preserve (and perhaps even strengthen) the former.²⁷

It will be argued here that Waldron is correct in that assessment, but that further discrimination is necessary if self-determination is to be adequately understood. Not only should the so-called “internal” and “external” forms be supplemented with additional categories (discussed further below), the standard vocabulary of “internal” and “external” self-determination is of limited use. So-called “internal” self-determination has both inward-facing and outward-facing aspects: “internal” self-determination goes to the legitimacy of governments and political systems (inward-facing aspect),²⁸ and it guarantees the principles of sovereign equality and non-interference (outward-facing aspect).²⁹ In other words, the “internal” form of self-determination posits two distinct principles: it asserts, first, that the *form* of government is legitimate only if in accordance with the wishes of the people to which the government applies;³⁰ and, secondly, that the form and functioning of their government is a matter for the people of the polity alone, and that interference by a foreign power or people is thus

²⁶ *ibid* 408. Buchanan, on entirely different grounds, also contests the equation of democracy and self-determination: Buchanan (n 2) 16 *et seq.*

²⁷ Waldron (n 24) 406 *et seq.*

²⁸ Patten calls this the “democratic” idea of self-determination: Alan Patten, ‘Self-Determination for National Minorities’ in Fernando R Tesón (ed), *The Theory of Self-Determination* (Cambridge University Press 2016). See *contra* Waldron (n 24) 408, quoted at n 30, below.

²⁹ Patten calls this the “statist” idea. Patten (n 28).

³⁰ That is not to say, however, that the *Government* must accord with the wishes of the population, nor that the Government must be *democratic*. On the contrary, as Waldron has observed, ‘[i]t is important, however, not to identify self-determination and democracy. The right of self-determination is prior to democracy, for it includes the right to decide whether to have a democracy around here, and if so, what sort of democracy to have. Self-determination is violated when we forcibly impose democracy on a country from the outside.’ (Waldron (n 24) 408.)

illegitimate.³¹ “Internal” therefore appears to be something of a misnomer, and it is perhaps for this reason that Waldron prefers the sobriquet “territorial”. The term *political self-determination* will be used here to capture much the same idea; determination of the nature and form of a society and the political structures that apply to it by the members of a socio-political community.³²

The “external” form, meanwhile, is often defined according to its effects. Here it is the displacement of sovereignty which is considered to be the hallmark of the category,³³ leading to a conflation of different kinds of claims. It encompasses not only the claim by a minority group of a right to independence purely as a function of its identity *qua* minority (that part of the norm Waldron calls “identity-based”, and Patten “nationalist” self-determination), but also the claim of a politically excluded group or a group subject to discrimination to secede as a remedy of last resort,³⁴ and the claim of a colonised people subject to the rule of a foreign power to independence and self-government.³⁵ As the historical experience will show, these forms have different ideational foundations and have received different legal treatment, and

³¹ Bas van der Vossen, ‘Self-Determination and Moral Variation’ in Fernando R Tesón (ed), *The Theory of Self-Determination* (Cambridge University Press 2016) 13–14.

³² This term is preferred to “territorial” because, as will be argued in chapter three and chapter four, a socio-political community of this kind need not necessarily be territorially defined, notwithstanding that all or virtually all or those communities that exist today to which the term would apply are defined along territorial lines.

³³ Cassese (n 3) 19; Mégret (n 7) 45–46.

³⁴ Ohlin characterises this as a combination of the right to exist and the right to resist: Ohlin (n 11).

³⁵ Cassese (n 3) 71–99.

as such will be treated separately, under the headings of *colonial self-determination*,³⁶ *secessionary self-determination*, and *remedial self-determination*.³⁷

1.2 Self-Determination and History

It was noted in the introduction that where a historical methodology is employed the approach and purpose for which it is used should be explained, in order that the author's subjective decisions are made known to the reader.³⁸ This chapter seeks a greater understanding of self-determination in the various historical usages of and appeals to the concept. A focus on the ways in which self-determination has been claimed is intended to show that various different understandings of the concept have been used both at different points through history, and also within different historical periods (and even within single theatres or documents).

As Rodríguez-Santiago notes, this task is complicated (and is made more vulnerable to subjectivity) by the fact that the term "self-determination" only dates from the twentieth century, while many of the categories that have been identified are more recent still (indeed, this piece is proposing a new "taxonomy").³⁹ The categorisation of earlier appeals made as "self-determination" claims, or as claims of a particular kind, is therefore anachronic and risks applying modern modes of thought to events which long predated them. In order to avoid (to the extent possible) these dangers, this chapter will focus on self-determination claims as

³⁶ As Binder points out, the decision to treat cases of colonial secession separately from secessions from unitary or post-colonial States is a political decision based on a perceived difference between these cases, which she regards as unjustifiable: Binder (n 2) 226 et *seq.*

³⁷ The term "remedial" is often attributed to Buchanan: Allen Buchanan, 'Secession, Self-Determination, and the Rule of International Law' in Jeff McMahan and Robert McKim (eds), *The Morality of Nationalism* (Oxford University Press 1997); Allen Buchanan, 'Theories of Secession' (1997) 26 *Philosophy & Public Affairs* 31; Buchanan, 'Democracy and Secession' (n 3).

³⁸ See above p.16-20.

³⁹ Rodríguez-Santiago (n 11) 202.

various kinds of appeals to justification which may be grouped together like with like, and which later acquired the status of concepts moral, political and (in some cases) legal. It will be argued that in different contexts the idea of self-determination has been understood as conferring different kinds of legitimacy by the individuals invoking it, and it will be argued that these legitimacy claims can broadly be categorised under the four headings defined above: political, remedial, colonial and secessionary.

The purpose of the chapter is not primarily to seek or identify a particular progression or direction of travel except in the sense that many of the later appeals to self-determination build upon or make reference to earlier examples (although certain trends will be identified, such as a trend towards the greater recognition of colonial self-determination during the period following WWI), and no attempt at a comprehensive history is therefore made. Rather the chapter identifies examples which pertain to each of the four species of self-determination (examples include the twin secessions of Norway, which provide a rare instance of a pure claim to secessionary self-determination), or which have a particular political significance (such as the American and French Declarations of 1776 and 1789) or a particular significance for international law (such as the Åland Islands dispute, which was the first of its kind to be submitted to a form of international adjudication).

2. Self-Determination in the 18th Century: the Genesis of an Idea

The idea of self-determination has evolved and changed significantly during the course of its development. Although it is difficult to pinpoint the genesis of the concept with any degree

of certainty, most scholars find its first expression in the American Declaration of Independence of 1776.⁴⁰

2.1. The American Declaration of Independence

The American Declaration of Independence was drafted by Thomas Jefferson, and was adopted in Congress by the (then) thirteen States of America on the 4th July, 1776.⁴¹ In the Declaration, Jefferson derives the right of the people of America to throw off the sovereignty of the King of England from his statement, said to be ‘one of the best-known sentences in the English language’,⁴² that:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.⁴³

As Lucas notes, the scope, and thus the true significance, of this statement is contested:

It has been studied and restudied by historians, critics, philosophers, and political theorists – usually in an effort to determine what Jefferson and the Congress intended by such phrases as “created equal” and “the pursuit of Happiness.” But there are no definitive answers – partly because Jefferson never explained what he meant, partly because the words of the Declaration did not mean the same thing to all members of Congress (or to all readers).⁴⁴

The definitional uncertainty noted by Lucas also applies to much of the remainder of the text. While the declaration as a whole clearly represents a claim by the American People of a right to separate from Britain, the basis and ambit of the right are not self-evident. If, as some have

⁴⁰ See e.g. Cassese (n 3) 11; Raič (n 13) 172–73; but, *contra*, Rodríguez-Santiago (n 11) 202–04, who finds precursors of the modern concept in the Fifteenth Century debates over the European colonisation of the Americas. The Declaration of Arbroath of 1320 exhibited some of the same ideas in protogeneous form.

⁴¹ ‘The Declaration of Independence: a Transcription’, U.S. National Archives & Records Administration, via <www.archives.gov/exhibits/charters/declaration_transcript.html> accessed 12th May 2014.

⁴² Stephen Lucas, ‘Justifying America: The Declaration of Independence as a Rhetorical Document’ in Thomas Benson (ed), *American Rhetoric: Context and Criticism* (Southern Illinois University Press 1989) 85.

⁴³ The Declaration of Independence (n 41).

⁴⁴ Lucas (n 42) 85.

suggested, the Declaration represents the first recognisable expression of a self-determination claim, it is not sufficient to identify simply by *genus*, however; in order to understand the origin of the principle and the precedent set by the Declaration it is necessary to understand the *source* of the claimed right, and thus to understand the legitimacy-claim made by its authors. In other words, it is necessary to examine the declaration and its language in more detail, to identify the *species* of self-determination it invokes.

The Declaration holds that, in order to protect the ‘unalienable Rights’ of man, ‘Governments are instituted among Men, deriving their just powers from the consent of the governed’.⁴⁵

Further:

That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundations on such principles and organizing its powers in such a form, as to them shall seem most likely to effect their Safety and Happiness.⁴⁶

While certain principles can be discerned in these statements, there remains much which requires clarification. These statements endorse social contract theory, and deny the divine right of kings; recognising instead what may loosely be described as popular sovereignty. It remains unclear, however, whether the right to self-determine exists in and of itself, as one of the ‘unalienable’ rights of man, or whether it applies as a result of governmental abuses – a government ‘destructive’ of its proper ends.

Nor does the remainder of the document explicitly clarify the basis of the right claimed. Although the Declaration holds that ‘Governments long established should not be changed for

⁴⁵ The Declaration of Independence (n 41).

⁴⁶ *ibid.*

light and transient causes',⁴⁷ this is described as an obligation of '[p]rudence',⁴⁸ rather than a limit on the right. Indeed, that abuses by governments are not preconditions for their overthrow is implied, if slightly, by Jefferson's assertion that 'a long train of abuses and usurpations' results not merely in a right, but also a 'duty' to 'throw off such a government'.⁴⁹ It may be significant, though, that while the intended *effect* of the document was secession, the text of the document speaks of the legitimacy of *governments*, and not of *States*. It may be inferred that two different incarnations of self-determination are engaged: the right to secede is concerned with the redrawing of political boundaries; the legitimacy of governments (political self-determination) necessarily presupposes those political delineations, and can only operate within them.

These are separate and distinct forms. The principle of political self-determination requires that the people of an entity should be able to freely choose what form their government will take, and is often defined according to the language of the declaration: government by the 'consent of the governed'.⁵⁰ As Waldron correctly identifies, however, political self-determination neither requires, nor is analogous to, democracy; rather it is a prior and more basic concern.⁵¹ Political self-determination requires that the people subject to a government be the authors of the *form* of that government. The American people were subject to a form of government that was not of their choosing, and which they regarded as inimical to their needs. But in representations to the British people aimed at altering that governmental form, America found no common cause:

⁴⁷ *ibid.*

⁴⁸ *ibid.*

⁴⁹ *ibid.*

⁵⁰ *ibid.*

⁵¹ Waldron (n 24) 408.

We have appealed to their native justice and magnanimity, and we have conjured them by the ties of our common kindred to disavow these usurpations, which, would inevitably interrupt our connections and correspondence. They too have been deaf to the voice of justice and of consanguinity.⁵²

In other words, the Declaration makes no claim to secession as of right. Rather, secession is justified on the basis of a final resort: having exhausted the possibility of a change in the form of government of the State as a whole, the American people could secure their ‘unalienable’ rights only by ridding themselves of the control of the British State. This is an example of what has subsequently been termed the right to secede *in extremis*, or *remedial self-determination*,⁵³ and this statement reveals something of its inner workings. Far from being a facet of a broader right to secede (of “external” self-determination), it is connected to the political form.⁵⁴ Where a section of a population is denied the right to determine along with others in the State the form of its government (in other words, the denial of political self-determination), there results an exceptional right to secede. It is this remedial form of the norm that is claimed alongside political self-determination by the authors of the Declaration of 1776.⁵⁵ No claim to secessionary self-determination, or a right to secede based only on the distinctiveness of a group or nation, was made.

In referring to the Declaration as a claim of right it is important to note, however, that the American Declaration made appeal not to remedial self-determination as an idea conferring *legality*, but as an idea conferring *legitimacy*. This was a moral and political claim made by

⁵² The Declaration of Independence (n 41).

⁵³ Buchanan, ‘Democracy and Secession’ (n 3) 24–25; Milena Sterio, *The Right to Self-Determination under International Law: ‘Selfistans,’ secession, and the Rule of the Great Powers* (Routledge 2013) 18–22; see also Allen Buchanan, ‘Theories of Secession’ (1997) 26 *Philosophy & Public Affairs* 31.

⁵⁴ Tesón characterises remedial self-determination’s claim as a ‘right *against* a state’, while secessionary self-determination claims a ‘right *to* a state’. Tesón (n 2) 8. [Emphasis in original].

⁵⁵ Rodríguez-Santiago (n 11) 206–07.

the authors that, as a people subject to abuses amounting to a denial of their internal self-determination, the secession of the Thirteen States from the British Empire was permissible and legitimate. They did not invoke a *legal* right to self-determination, and there is no indication that they considered in writing the Declaration that they were acting in accordance with, with the support of, or, indeed, in violation of international law.

As a political document the American Declaration of Independence is and will doubtless remain highly significant, including for its discussion of self-determination. The reader is presented with an apparent paradox: the intended effect of the document is secession, but the rhetoric relates to political self-determination. A further examination, however, reveals an implied connection between political self-determination and secession, and shows that denial of the former is conceived as the basis for the latter. This was a consequential right of secession, and not a pure appeal to nationhood or distinctiveness. It seems that it should, therefore, be categorised as an appeal to remedial self-determination, a form which finds its roots in the political rather than the secessionary idea. The Declaration was, however, merely the starting point, and the ideas inherent in the Declaration have been reconceptualised and restated in many different forms in the interim. Among the most significant of these subsequent statements was the product of the 1789 French Revolution.

2.2. The French Revolution of 1789

The *Declaration des droits de l'homme et du citoyen* was adopted on the 26th August 1789, marking the height of the 1789 Revolution. It represented a powerful recognition of political

self-determination, both in its denial of the divine right of kings, and its declaration of the right of Peoples to self-government.⁵⁶

Like the American Revolution, the French Revolution of 1789 espoused a philosophical conviction that '[m]en are born and remain free and equal in rights.'⁵⁷ Those rights, variously referred to as 'unalienable'⁵⁸ and 'imprescriptible',⁵⁹ are declared to be 'Liberty, Property, Safety and Resistance to Oppression.'⁶⁰ Like the American Revolution, too, the French Revolution recognised the principle of popular sovereignty: 'The principle of any Sovereignty lies primarily in the Nation. No corporate body, no individual may exercise any authority that does not expressly emanate from it.'⁶¹ Cassese comments that, taken together, these events

[M]arked the demise of the notion that individuals and peoples, as subjects of the King, were objects to be transferred, alienated, ceded, or protected in accordance with the interests of the monarch.⁶²

The French Revolution declared that the legitimacy of the form of government derives from the will of the people, and that the People, as a corporate entity, has the right to alter that form of government.⁶³ In other words, the rhetoric of the French Revolution recognised and declared a right to political self-determination.

⁵⁶ Raič (n 13) 174–75; Cassese (n 3) 11–13.

⁵⁷ 'Declaration of Human and Civic Rights of 26 August 1789', via <<http://www.conseil-constitutionnel.fr/conseil-constitutionnel/english/constitution/declaration-of-human-and-civic-rights-of-26-august-1789.105305.html>> accessed 14th May 2014, article 1.

⁵⁸ *ibid* preamble.

⁵⁹ *ibid* article 2.

⁶⁰ *ibid*.

⁶¹ *ibid* article 3.

⁶² Cassese (n 3) 11.

⁶³ Raič (n 13) 174.

However, the French Revolution also contemplated an infant right to secessionary self-determination, in the form of irredentism. Self-determination was proposed as the governing principle in transfers of territory as early as 1790, and the principle was codified in the Draft Constitution presented to the National Convention in 1793.⁶⁴ As Raič notes, ‘the plebiscite as a means of determining the political fate of a territory was an invention of the French Revolution.’⁶⁵ Although the proffered choice was between existing States (independence was not envisaged), the plebiscite as the primary tool of territorial delimitation appears to be based on a conviction that peoples are entitled to determine their own political fate, even to the extent of choosing which State to belong to. Thus, Rigo Sureda argues that the most noteworthy aspect of the philosophy of the French Revolution was that it severed the link between State ‘ownership’ and territory:

[T]he territorial element in a political unit lost its feudal predominance in favour of the personal element: people were not to be any more a mere appurtenance of the land.⁶⁶

If the recognition of self-determination as a right of peoples in determining their political status was significant, however, the principle as applied did not live up to these noble ideals. Although the revolution yielded a number of statements which repudiated wars of conquest and territorial acquisitions,⁶⁷ this ideal was ultimately subsumed by a conception of the freedom of mankind that went beyond the polity.⁶⁸ The Revolution’s conviction was that individuals should no longer be in thrall to a social elite, and it therefore followed quite logically that populations should be enabled to join the new, free, France. Revolutionary

⁶⁴ Cassese (n 3) 11.

⁶⁵ Raič (n 13) 174. [Footnoted omitted].

⁶⁶ Andrés Rigo Sureda, *The Evolution of the Right of Self-Determination: A Study of United Nations Practice* (AW Sijthoff-Leyden 1973) 17.

⁶⁷ Rodríguez-Santiago (n 11) 206.

⁶⁸ As Hobsbawm notes, ‘the French [revolution] was ecumenical. Its armies set out to revolutionize the world; its ideas actually did so.’ Eric J Hobsbawm, *The Age of Revolution: Europe 1789-1848* (Weidenfeld and Nicholson 1962) 75.

thought therefore recognised a doctrine of secessionary self-determination premised on the freedom of the individual and the right of peoples ‘not content with the government of the country to which they belong [...] to secede and organise themselves as they wish.’⁶⁹ In practice, however, the freedom of the individual was mythologised to the extent that actions which detracted from an individual’s ability to freely self-determine were justified in its pursuit. Self-determination was deployed to rationalise the transfer of territories to France if the populace voted in favour of incorporation,⁷⁰ and sometimes even if it did not:

At first, the French revolutionaries consistently with their ideals renounced all wars of conquest and agreed to annexations of territory to France only after a plebiscite. However, when they considered that their democratic ideals were threatened, they tried to impose them by force upon other peoples: how could men choose not to be free?⁷¹

Whatever the deficiencies in the application of the principle, the French revolutionary conception of self-determination should be seen as highly significant. Although the application of self-determination principles was not consistent with the ideals which underpinned them, there can be no doubt that the principles enunciated in 1789 and the years that followed further advanced the sense that self-determination conferred legitimacy, and were a significant contribution to the development of the concept.

2.3 The Age of Revolution and the Long 19th Century – 1789-1920

The ‘Age of Revolution’ is a term used by Hobsbawm to refer to the years 1789-1848 – a period of extraordinary political and social change in Europe.⁷² During this period, which saw

⁶⁹ Rigo Sureda (n 66) 17.

⁷⁰ Cassese (n 3) 12.

⁷¹ Rigo Sureda (n 66) 18. [Footnotes omitted].

⁷² Hobsbawm (n 68) 1–4.

the beginning of the industrial revolution,⁷³ democratic uprisings threatened many of Europe's monarchies, in some cases successfully,⁷⁴ and the period had a significance which went far beyond Europe. Armitage identifies this as the first of four independence 'moments' – points in time which saw the creation of many new States and the diminution of empires.⁷⁵

The influence of the American and French declarations on the would-be revolutionaries or secessionists of this period is difficult to quantify, but almost impossible to overstate. It is clear that the American declaration was an influence on the French revolutionaries, and that the potential of both documents to inspire or incite others was amply appreciated. As Armitage observes, '[t]he claim of some French revolutionaries that their movement owed its inspiration to the United States rendered key documents like the Declaration suspect and dangerous in the eyes of those who feared the wholesale destruction of the political and diplomatic order of the Atlantic world.'⁷⁶ The fear was justified: the American influence on many of the declarations of independence in the period was clear to see,⁷⁷ and the influence of the French revolution was arguably greater still. As Hobsbawm notes, 'France made [the 19th century's] revolutions and gave them their ideas, to the point where a tricolour of some kind became the emblem of virtually every emerging nation'.⁷⁸

Hobsbawm is undoubtedly correct to highlight the importance of the French revolution. It is here that the inward-facing aspect of the idea of political self-determination—that the form of

⁷³ *ibid* 27 *et seq.*

⁷⁴ *ibid* 109–12.

⁷⁵ David Armitage, *The Declaration of Independence: A Global History* (Harvard University Press 2007) 107.

⁷⁶ *ibid* 67.

⁷⁷ *ibid* 108.

⁷⁸ Hobsbawm (n 68) 73.

government should be determined by the people—finds its most influential roots. Nevertheless, the influence of the American declaration should not be underestimated: it remains true that there was, as identified by Armitage, an ‘American component’ to many of the revolutions of the long 19th Century,⁷⁹ composed of a combination of substance and form. Substantively, the American declaration sought to establish an independent State with full external sovereignty.⁸⁰ To that extent, it signalled an intention on the part of the Declaration’s authors to “play within the rules” of the international system. By conforming to the established models of statehood and sovereignty, they chose to ‘affirm the maxims of European statecraft, not affront them.’⁸¹ Truistic though it may appear, it is significant that the great majority of subsequent declarations of independence, too, sought independent statehood. That revolutionary approaches to political authority conformed so closely to the established norm served further to entrench that norm, and the State was thus (re-)established as the single viable form of non-dependent socio-political community within this international legal paradigm. To this extent, the American independence struggle and those that followed it were ‘decidedly *un*-revolutionary’ revolutions.⁸²

More significantly still, the form of the 1776 Declaration proclaimed the principle of remedial self-determination, and this is (at least in this area) arguably its most profound and lasting legacy. Like the American declaration, the majority of independence movements which followed made claims to remedial self-determination. Their focus is on the rights (individual or collective) of the people, and they begin with an exposition of the iniquities suffered by the would-be State on the understanding that to cast their claim as a remedy to long suffering

⁷⁹ Armitage (n 75) 108.

⁸⁰ *ibid* 112–13.

⁸¹ *ibid* 65.

⁸² *ibid*; see also Hobsbawm (n 68) 74–75.

confers legitimacy. This feature is particularly clear in, for example, the declarations of independence of Flanders,⁸³ Venezuela,⁸⁴ Liberia,⁸⁵ and Hungary,⁸⁶ and can be seen in most declarations of the period.⁸⁷ These appeals to remedial self-determination, although unlikely to have created a legal right, are very likely to have further instituted the growing *sense of*

⁸³ Manifesto for the Province of Flanders, in Armitage (n 75) 187–91:

‘... it is incontestable that the Emperor has broken all of his agreements with us. By violating the social and inaugural pact, he freed the Nation to sever its bond of obedience. Moreover, he has remained deaf to the humble and renewed appeals of a Nation that sought redress for its grievances until the final hour. In waging war upon us, the Emperor obliged us to meet force and to claim all those rights granted by the Law of Nations to victorious parties.’

⁸⁴ Venezuelan Declaration of Independence, in *ibid* 199–207:

‘We, the Representatives of the united Provinces of Caracas, Cumana, Varinas Margarita, Barcelona, Merida, and Truxillo, forming the American Federation of Venezuela, in the South Continent, in Congress assembled, considering the full and absolute possession of our Rights, which we recovered justly and legally from the 19th of April, 1810, in consequence of the occurrences in Byona, and the occupation of the Spanish Throne by conquest, and the succession of a new Dynasty, constituted without our consent: are desirous, before we make use of those Rights, of which we have been deprived by force for more than three ages, but now restored to us by the political order of human events, to make known to the world the reasons which have emanated from these same occurrences, and which authorise us in the free use we are now about to make of our own Sovereignty.’

⁸⁵ The declaration of Independence of Liberia, in Charles Henry Huberich, *The Political and Legislative History of Liberia* (Central Book Co 1947) vol 1, 828 et seq:

‘We, the people of the Republic of Liberia, were originally the inhabitants of the United States of North America.

‘In some parts of that country we were debarred by law for all rights and privileges of man – in other parts, public sentiment, more powerful than law, frowned us down.

‘We were excluded from all participation in the government.

‘We were taxed without our consent.

‘We were compelled to contribute to the resources of a country which gave us no protection.

‘We were made a separate and distinct class, and against us every avenue of improvement was effectively closed. Strangers from other lands, of a color different from ours, were preferred before us. [...]’

⁸⁶ Hungarian Declaration of Independence, in Henry de Puy, *Kossuth and His Generals* (Phinney & Co 1852) 202–25; see also Armitage (n 75) 124:

‘WE, the legally constituted representatives of the Hungarian nation, assembled in Diet, do by these presents solemnly proclaim, in maintenance of the inalienable natural rights of Hungary, with all its dependencies, to occupy the position of an independent European State – that the house of Hapsburg-Lorraine, as perjured in the sight of God and man, has forfeited its right to the Hungarian throne. At the same time we feel ourselves bound in duty to make known the motives and reasons which have impelled us to this decision, that the civilised world may learn we have taken this step not out of overweening confidence in our wisdom, or out of revolutionary excitement, but that it is an act of the last necessity, adopted to preserve from utter destruction a nation persecuted to the limit of its most enduring patience.

‘Three hundred years have passed since the Hungarian nation, by free election, placed the house of Austria upon its throne, in accordance with stipulations made on both sides, and ratified by treaty. These three hundred years have been for the country, a period of uninterrupted suffering.’

⁸⁷ For an excellent table listing many of the post-1776 declarations of independence see Armitage (n 75) 146–55.

right which was a hallmark of both the American and French declarations:⁸⁸ an exercise of remedial self-determination following the denial of the political form was seen by secession movements as a legitimate justification for rebellion, and each declaration which appealed to those principles further entrenched the status of remedial self-determination as conferring legitimacy on those who invoked it.

Few secession movements during this period appealed to justifications other than remedial self-determination, but there are notable exceptions. One such example is Norway. In both 1814 (ultimately unsuccessfully) and 1905 (successfully) the Norwegian people sought their independence from the Scandinavian powers. Norway's 1814 declaration of independence, in particular, is noteworthy, because of its claim to secessionary self-determination.

2.3.1 The Secessions of Norway – 1814

At the beginning of 1814 Norway was, and had been since 1380, a territorial possession of the Danish Monarchy.⁸⁹ While the union began as a consensual union of two States under a common ruler, Norway's independent character was gradually eroded.⁹⁰ The decisive moment in this decline was the declaration, in the 1536 Charter, 'that the country should cease to be a separate kingdom, and be incorporated in Denmark.'⁹¹ Thereafter Norway was ruled from Denmark and had no international representation, becoming little more than a region in a

⁸⁸ See above, p.41.48.

⁸⁹ Karen Larsen, *A History of Norway* (Princeton University Press 1948) 373–95, esp. 390.

⁹⁰ *ibid* 208–76, esp. 232, 243.

⁹¹ *ibid* 232.

Danish State. The PCIJ has subsequently concluded that during this period the Norwegian State ceased to exist.⁹²

Norway remained a Danish possession until 1814, when it gained a short-lived independence.⁹³ The Napoleonic wars wrought significant changes in the power structures of Scandinavia. Although initially neutral, Denmark, Sweden and Russia were drawn into the wars. Denmark allied itself to France; Russia to Great Britain. Sweden initially joined Napoleon, but following the 1809 Finnish War and the loss of Finland to Russia, Sweden made overtures to the Anglo-Russian coalition.⁹⁴ Its crown prince, Karl Johan, sought to gain the friendship of Russia by renouncing its claim to Finland, hoping instead to acquire Norway.⁹⁵ By October 1813 the Danish cause had been defeated at the battle of Leipzig and, on 14th January 1814, Denmark and Sweden concluded the Treaty of Kiel, by which Norway would be transferred ‘with all rights, entitlements and incomes, in full ownership and full sovereignty to His Majesty the King of Sweden.’⁹⁶ The implementation of the Treaty was frustrated by Norway’s claim of independence, however. This situation was remarkable because Norway claimed a right to independence based solely on its separate national character and the will of its people:⁹⁷ it did not claim a subsisting sovereignty, nor that it had gained a right to independence as a result of historical wrongs. In other words, Norway’s claim was one of secessionary self-determination. Although it did not yield Norway’s independence—the Kings of Sweden would rule Norway from 1814-1905—the situation was

⁹² *Legal Status of Eastern Greenland*, (1933) PCIJ Series A/B, no.53, 22, 27-30.

⁹³ Ivar Libæk and others, *The History of Norway after 1814* (J. Irons (tr.), Font Forlag 2012) 10.

⁹⁴ Larsen (n 89) 367–68; Knut Gjerset, *History of the Norwegian People* (AMS Press 1969) vol 2, 407–10.

⁹⁵ Larsen (n 89) 368; Gjerset (n 94) 407; *Legal Status of Eastern Greenland* (n 58) 30.

⁹⁶ Der Kieler Frieden, 1814, Artikel IV, via <<http://www.kieler-frieden.info/>> accessed 22/7/14. My translation.

⁹⁷ Gjerset notes that the people of Norway ‘felt that they had been bartered away in a manner disgraceful to a free people.’ Gjerset (n 94) 417.

remarkable, too, in that Norway's claim appears to have been accepted by Sweden. Indeed, Norway was *de facto* independent for some months, and when united with Sweden—compelled by the threat of vastly superior Swedish military force, lack of sympathy among the great powers, and a British naval blockade—it was as a distinct State under a joint monarchy, and not as the territorial possession envisaged by the Treaty.

Following the conclusion of the Treaty of Kiel there was widespread resentment against Denmark and Sweden in Norway; the one for bargaining away the country without consultation, the other for seeking to gain control of Norway against the wishes of its population.⁹⁸ An assembly of elected delegates was called and, on 17th May, a new Constitution was signed at Eidsvoll.⁹⁹ It included a statement that 'Norway [...] shall be a free, independent, and indivisible kingdom[.]'¹⁰⁰ At a similar time, Karl Johan ordered that a force be sent to occupy Norwegian fortresses, stating that 'Norway is to be taken possession of, not as a province, but only to be united with Sweden in such a way as to form with it a single kingdom.'¹⁰¹ The intention of Sweden was very clear: Norway would not be independent, but would be incorporated as a part of the Swedish State.

As the war in Europe came to an end and Karl Johan was able to re-focus on the acquisition of Norway, so too did Norway's short-lived independence.¹⁰² As Swedish forces returned to Sweden it became increasingly obvious that resistance against the far-superior Swedish military was doomed to fail and, indeed, hostilities lasted only from 29th July to 14th August,

⁹⁸ Larsen (n 89) 376.

⁹⁹ *ibid* 385.

¹⁰⁰ *ibid* 384.

¹⁰¹ Gjerset (n 94) 416.

¹⁰² Larsen (n 89) 381.

when the Convention of Moss was signed.¹⁰³ During the brief conflict the Norwegian forces had been significantly overmatched,¹⁰⁴ and there can be little doubt that, had the war been prosecuted to its conclusion, heavy defeat for Norway would have resulted.¹⁰⁵ Nevertheless, a number of significant concessions were made to Norway. Notably, the Convention of Moss made no reference to the Treaty of Kiel, and did not seek to effect the union of the two States. On the 20th October 1814 the Norwegian *Storting*, the Parliament established under the Eidsvoll Constitution, voted in favour of the union of Norway and Sweden as independent states under a common monarchy, and Karl Johan proclaimed the ‘freedom of each nation’.¹⁰⁶

It may seem strange to speak of a successful claim to self-determination on the part of Norway when, as the result of a short war and the threat of force, Norway ultimately entered into an unpopular union with Sweden. The change in the Swedish position over the course of 1814 is, however, striking. At the beginning of the year Sweden claimed an absolute sovereignty and title over Norway as a result of the Treaty of Kiel, and there can be little doubt that at the beginning of 1814 Norway was not a State, having lost its independence in 1536. However, when the union was carried into effect in October 1814, Norway entered the joint monarchy consensually, as the result of an international treaty—the Convention of Moss—concluded between Sweden and Norway, and with an established Constitution which (contrary to the wishes of Sweden) was amended in the course of the incorporation negotiations to strengthen Norway’s independence. During this process Sweden treated Norway not as a rebellious province to which it already had title, nor as a conquered territory, but as a sovereign State

¹⁰³ *ibid* 390–91.

¹⁰⁴ Gjerset notes that not only was the Swedish army and navy significantly larger than those of Norway, but that England, Russia and Prussia were ready to commit troops and naval vessels to assist the Swedish cause: Gjerset (n 94) 440.

¹⁰⁵ Libæk and others (n 93) 12.

¹⁰⁶ Larsen (n 89) 391–95; Gjerset (n 94) 441.

with international capacity.¹⁰⁷ Nor, it appears, was Norway's independent personality lost as a result of the union, as the events of 1905 were to demonstrate.

2.3.2 *The Secessions of Norway – 1905*

In 1905 the 91-year union between Sweden and Norway came to an end. While some within Sweden considered Norway an inferior partner in the union, Norway regarded itself as an equal, sovereign State.¹⁰⁸ Both in matters of internal governance and external relations Norway sought to exercise its independence, creating a quiet conflict with the King of Sweden. The events leading to the dissolution of Norway/Sweden in 1905 suggest that Norway not only achieved independence in 1814, but that it did not lose that independence when it united with Sweden.¹⁰⁹ When it sought to leave the Swedish union, it was as a State asserting its sovereign right.

The political structure of Norway/Sweden was complex and contested, with both sides of the union claiming a greater degree of power and control (on Sweden's part) or autonomy (on Norway's) than the other would accept.¹¹⁰ Thus, while the *Storting* and the Norwegian

¹⁰⁷ 'The Act of Union, like the constitution of Norway, recognized the Union as resting, not on the Treaty of Kiel, but on the free consent of the Norwegian people, and the complete equality of the two realms.' Gjerset (n 94) 445.

¹⁰⁸ Larsen (n 89) 484.

¹⁰⁹ Although perhaps a strange claim to the ear of a modern international lawyer, it was at that time and in the preceding century common for entities seeking independence to do so on the basis that their incorporation with another State had not extinguished their separate personality, which could be revived. This was a particular feature of claims to independence by regions which retained a measure of self-government (as, for example, in the case of several of those American states which seceded to form the Confederacy in 1860-61), and in States which had the structure of a dual- or common monarchy (as, for example, in the case of Hungary in 1848-9, see above n 86), but was not confined to those contexts (see, for example, the Declaration of Independence of Venezuela in 1811, above, n 84). Norway's claim to independence appears to have fallen into this category: given that it consensually entered into a dual monarchy with Sweden by means of an international agreement, the argument runs, it retained its status as an international person and could, by denouncing the treaty which effected it, unilaterally bring the union to an end.

¹¹⁰ Gjerset (n 94) 477.

Government had a day-to-day competence for the internal governance of Norway, the Government was an appointment of the King, and he had (and made use of) the power to veto legislation. Two incidents in particular are especially demonstrative of the conflict over Norway's political status. The first came to a head in 1884, and concerned the power of the Norwegian *Storthing* to amend the constitution without the King's approval. Three successive *Storthings* had passed a constitutional amendment intended to seat the Norwegian ministers in the *Storthing*, but on all three occasions the King vetoed the measure.¹¹¹ While it was clear that the King had the power to veto ordinary legislation, many within the *Storthing* refused to accept a power of veto over constitutional amendments.¹¹² Accordingly, on the 9th June 1880, the *Storthing* overwhelmingly passed a resolution declaring that the Constitution had been successfully amended and instructing the government both to promulgate and comply with it. This the government, anxious to avoid a conflict with Sweden, refused to do.¹¹³ No further action was taken until 1882. The final card left to the *Storthing* was its power to impeach the ministers for their failure to comply with the Constitution, and there was an understandable reluctance to pursue such a radical course. Following the 1882 election, however, which gave the majority within the *Storthing* a clear mandate from the electorate to pursue the amendment, impeachment proceedings were begun against the ministers.¹¹⁴ On the 27th February 1884, the ministers were found guilty of failing to comply with the constitution, and eight ministers were sentenced to loss of office.¹¹⁵ Perhaps surprisingly, the King chose to ratify the decision, and dismissed the government. Having first failed to form a new government of the unionist Right, the King asked majority leader Johan Sverdrup to form a government and, on the 2nd

¹¹¹ Larsen (n 89) 456.

¹¹² *ibid* 457.

¹¹³ *ibid*.

¹¹⁴ Gjerset (n 94) 541.

¹¹⁵ Larsen (n 89) 458.

July 1884 Sverdrup and his new ministers took their seats in the *Storting*.¹¹⁶ In defying the King's veto of the constitutional amendment Norway was asserting its independence. The *Storting* had declared that the monarch's legitimate power stemmed from the Constitution, rather than constitutional legitimacy flowing from the monarch. In doing so, it asserted the control of Norway over the legal basis of the union.

A second source of conflict was the external competences of the two States, and it was to precipitate the end of the union. In 1885 Sweden proposed a new Council of foreign affairs, consisting of 'the minister of foreign affairs [...] two other members of the Swedish and three of the Norwegian ministry.'¹¹⁷ The proposal created outrage—never before had it been specified that the minister of foreign affairs of Norway/Sweden had to be a *Swedish* minister¹¹⁸—and it was seen as proof of Norway's inferior position in the union.¹¹⁹ Norway by this time had the third largest merchant marine in the world, and there was widespread feeling among its ship-owners and seamen that its unique interests were not being catered to by the Swedish diplomatic service.¹²⁰ Old desires for distinct Norwegian international representation were reawakened and, in 1891, the *Storting* passed a bill establishing a Norwegian consular service. Despite Norway's opinion that such an action was within its area concern as stipulated in the Act of Union, Sweden held that the establishment of a consular service was a matter for the union and, accordingly, the King vetoed the bill.¹²¹ A period of low-level conflict followed for several years evidenced by a succession of short-lived

¹¹⁶ *ibid*; Gjerset (n 94) 544.

¹¹⁷ Larsen (n 89) 485.

¹¹⁸ *ibid* 485–86; Gjerset (n 94) 560.

¹¹⁹ Oscar J Falnes, *Norway and the Nobel Peace Prize* (1938) 125–31.

¹²⁰ Larsen (n 89) 486–87.

¹²¹ *ibid* 487.

Norwegian governments until, on 11th March 1905, a government was formed under the charismatic Christian Michelson.¹²²

Michelson's actions swiftly brought the crisis to a head. On the 27th May 1905 the Norwegian ministers in Stockholm presented the King with a new bill establishing a Norwegian consular service. Once again the King vetoed the measure.¹²³ On this occasion, however, refusing to accept the veto, the ministers offered the King their resignation, and immediately returned to Norway.¹²⁴ On the 7th June, the Michelson government resigned *en masse*, and presented to the *Storting* two resolutions, which were adopted without debate.

The first stated that whereas a primary duty of a constitutional monarch was to supply the country with a responsible government and the king was unable to do this, the royal power had ceased to function. Oscar II had therefore ceased to be king of Norway, and thereby the union, which had existed by virtue of a common monarch, had come to an end.¹²⁵

In the second, the *Storting* communicated the end of the Union to King Oscar II, and asked his leave to elect a Bernadotte Prince to the throne of Norway. The *Storting*'s actions were subsequently endorsed by the electorate by a huge margin in a referendum.¹²⁶

The *Storting*'s declaration almost provoked a war. Surprisingly, Sweden appeared to be willing to allow Norway to leave the union, but Sweden demanded that a series of concessions be made, not least that a neutral zone be implemented along the border, and that several

¹²² *ibid* 488–89.

¹²³ Gjerset (n 94) 577.

¹²⁴ *ibid*.

¹²⁵ Larsen (n 89) 490.

¹²⁶ 'Over 84 per cent of the voters turned out, and the events of June 7 were approved by a vote of 368,208 against 184.' Larsen (n 89) 491. Significantly, Gjerset notes that it was *Sweden* which demanded that the independence desire be confirmed by plebiscite, and that the King agreed to concede the separation of Norway on that basis: Gjerset (n 94) 582. This appears to be a recognition of the competence of the Norwegian people to determine their political future.

frontier forts be demolished. In Norway these demands were seen as quite unacceptable, and for a time it appeared that no compromise could be reached. Troops were mobilised, and it appeared that the two countries might slide once more into conflict.¹²⁷ Eventually, however, the countries negotiated the demilitarisation of certain Norwegian frontier forts rather than their demolition and, on the 23rd September 1905, the Karlstadt agreement was signed, repealing the Act of Union. On the 27th October, Oscar II abdicated the throne of Norway, and the Union was at an end.¹²⁸

The Norwegian secessions are examples of a trend which typified the Age of Revolution, and which has arguably continued until the present day: the growing acceptance that self-determination confers legitimacy. Like the Declaration of Independence of 1776 and the French Declaration of 1789, Norway's invocation of self-determination principles was a claim of legitimacy. It is a rare and intriguing example, however, in that the claim of the Norwegian people was of secessionary self-determination, and did not cite the abuses of the sovereign as justification. On the contrary, Norway claimed its independence on the basis of its will. Equally unusual was Sweden's apparent acceptance of the legitimacy of Norway's claim: few claims to secessionary self-determination have been made, fewer have been successful, and fewer still received the blessing of the previous sovereign. The pattern holds true in the modern day, where secessionary self-determination continues to be repudiated by the majority of States (although it is in the modern day, too, that one may find echoes of the Norwegian example).¹²⁹ Notwithstanding its singular character, the Norwegian secessions suggest that

¹²⁷ Larsen (n 89) 492.

¹²⁸ *ibid.*

¹²⁹ In the 2014 Scottish Independence campaign, the Government of the United Kingdom accepted that Scotland's future was a matter to be decided by the people of Scotland, which may suggest a similar legitimacy-belief. See Agreement Between the United Kingdom Government and the Scottish Government on a Referendum on Independence for Scotland (15 October 2012), via <<http://www.gov.scot/About/Government/concordats/Referendum-on-independence>> accessed 5/8/15. Similar acceptance that a group has a (politico-moral) right to secessionary self-determination can be seen in the 1983

the concept of self-determination was, by this time, seen as conferring a substantial legitimacy on those invoking it.

Although the Norwegian example is in many respects unique, it should be noted that like the declarations of 1776 and 1789 Norway's was a political and a moral claim, and not an appeal to international law. It is clear, therefore, that the example can reveal little about the legality of self-determination. It was in the years that followed, however, that the first internationalised dispute concerning self-determination—the Åland Islands dispute of 1920—was decided, and the question of self-determination's legality, rather than legitimacy, came to the fore.

2.4 The Åland Islands

The Åland Islands “case” remains a renowned example of a self-determination claim, and one of the first to be subject to international adjudication.¹³⁰ The Åland Islands are a Swedish-speaking archipelago off the coast of Finland, and in 1920 Sweden asked the Council of the League of Nations to decide whether the islanders had a right to secede and join Sweden. Following agreement by Finland the Council of the League appointed a Committee of Jurists to pronounce on the jurisdiction of the Council.¹³¹ Following their determination that the Council had jurisdiction, the Council appointed a Commission of Rapporteurs to make substantive recommendations.¹³² Both reports considered the claims of the Åland islanders to

Constitution of St Kitts and Nevis (The Saint Christopher and Nevis Constitutional Order, 1983, s.113(1-80)), and the 1994 Ethiopian Constitution (Constitution of Ethiopia. 1994, s.39(1), 39(5)).

¹³⁰ Thomas D Musgrave, *Self-Determination and National Minorities* (Clarendon Press 1997) 32.

¹³¹ Report of the International Committee of Jurists entrusted by the Council of the League of Nations with the task of giving an advisory opinion upon the legal aspects of the Åland Islands question, Official Journal of the League of Nations, Special Supplement No.3, October 1920, 5.

¹³² Report Presented to the Council of the League of Nations by the Commission of Rapporteurs, B7 21/68/106 (1921).

self-determination, and reveal a great deal about the ambit and nature of self-determination as it was then understood. The process was all the more remarkable, too, because the Jurists and the Rapporteurs reached very different conclusions.

The Jurists began their analysis with an examination of the relationship between self-determination and State sovereignty. Their conclusion was that State sovereignty, in the absence of an express limitation, remains dominant.¹³³ Nevertheless, the Jurists accepted that self-determination has a role to play in the formation of States. Where a State is, as yet, unformed and its sovereignty is imperfect, ‘aspirations of certain sections of a nation [...] may come to the surface and produce effects which must be taken into account in the interests of the internal and external peace of nations.’¹³⁴ Indeed, the Jurists cast national self-determination as ‘the most important of the principles governing the formation of States’,¹³⁵ but one that is nevertheless confined to the pre-State context. Any other finding, they argued, would be ‘contrary to the very idea embodied in the term “State”’.¹³⁶ While it is clear that the Jurists’ understood self-determination to be a right attaching to “nations”, then, they construed it as a weak right and one which is subordinate to the right of the State to territorial integrity. Nevertheless, that weak right was applied in this case: the Committee concluded that the League of Nations had competence to address the question because ‘Finland had not yet acquired the character of a definitively constituted State.’¹³⁷ Thus, it was because Finland had not yet achieved statehood and its rights over the territory were less than sovereign that the

¹³³ Report of the International Committee of Jurists (n 131) [2].

¹³⁴ *ibid* [3].

¹³⁵ *ibid*.

¹³⁶ *ibid* [2].

¹³⁷ *ibid*, Conclusion [2].

claim to self-determination should be considered, and not because self-determination was a right capable of defeating the claim of the sovereign State over its territory.

Far from recognising an effective right to secede, therefore, the report of the Committee of Jurists declared that sovereignty prevails over self-determination. Nor, as has been wrongly suggested,¹³⁸ did the Jurists assert that remedial principles may operate to “internationalise” an ostensibly domestic dispute:

The Commission, in affirming these principles, does not give an opinion concerning the question as to whether a manifest and continued abuse of sovereign power, to the detriment of a section of the population of a State, would, if such circumstances arose, give to an international dispute, arising therefrom, such a character that its object should be considered as one which is not confined to the domestic jurisdiction of the State concerned, but comes within the sphere of action of the League of Nations.¹³⁹

It is important to note, first, that the Committee declined to give an opinion on the question. Regardless, however, interpretation of their statement as an endorsement of remedial self-determination would be questionable, given that the passage considers only who should have jurisdiction over the dispute, and not on what principles it should be decided. Indeed, the passage even suggests that the abuse of sovereign power by a State would not be sufficient, in itself, to confer jurisdiction on the League of Nations, but that the dispute would first have to be “internationalised” by other means.¹⁴⁰

While the Jurists decided that the right to self-determination had relevance for the question because Finland had not yet attained full sovereignty, the Rapporteurs were emphatic that no right to secessionary self-determination then existed in international law.¹⁴¹ Unlike the

¹³⁸ Cassese (n 3) 31.

¹³⁹ Report of the International Committee of Jurists (n 131) [2].

¹⁴⁰ *ibid.*

¹⁴¹ Report of the Commission of Rapporteurs (n 132) 3-4.

Committee of Jurists, though, the Rapporteurs did explicitly recognise a right to remedial secession ‘as a last resort when the State lacks either the will or the power to enact and apply just and effective guarantees’ of minority rights.¹⁴² They stressed, however, that such a secession ‘can only be considered as an altogether exceptional solution’.¹⁴³ Applying the criteria for such a right to the case of the Åland Islanders, they found that no such exceptional situation existed, and that Finland was prepared to offer the Islanders protection of their rights as a minority.¹⁴⁴ They therefore concluded that the Islanders did not have a right to separate from Finland.¹⁴⁵

Although the reports disagree on a great many points, it is clear that self-determination was considered by both to be subordinate to territorial sovereignty. While the Jurists believed that secessionary self-determination existed as a right, albeit a weak right which would only have application where the State’s sovereignty was imperfect, the Rapporteurs denied its legal character altogether.¹⁴⁶ Concurrently, in a conclusion which lends further support to the ideational separation between the secessionary and the remedial forms, the Rapporteurs recognised that a right to remedial secession may exist in international law (although they were emphatic that it would not apply to the circumstances of the Åland Islands), a point on which the Jurists made no determination.¹⁴⁷ Overall, the Åland Islands question did not greatly clarify either the legal status of the various forms of self-determination, or their ambits. Even if a right either to secessionary or to remedial self-determination existed at this time, any such

¹⁴² *ibid* 4.

¹⁴³ *ibid*.

¹⁴⁴ *ibid* 5.

¹⁴⁵ *ibid* 5; see also Musgrave (n 130) 36.

¹⁴⁶ Report of the Commission of Rapporteurs (n 132) 3.

¹⁴⁷ *ibid* 4; Report of the International Committee of Jurists (n 131).

right must be regarded as weak and imperfect, and to be at least as much a question of politics as a question of law. It was only through the decolonisation process that this was to change, and that a form of self-determination with an unambiguously legal status was to emerge.

3. Self-Determination and Decolonisation

Although since 1776 it had been invoked by many States and peoples, at the beginning of the twentieth Century self-determination remained an inherently controversial concept among States. In the aftermath of the First World War, however, self-determination began to gain currency and acceptance as a tool in the decolonisation process.

In many ways the story of the twentieth Century post-WWI is a story of decolonisation. Although there were many other notable developments in international law and politics during the period (including the foundation of the League of Nations and the laying of the groundwork of the United Nations), the massive expansion and diversification of the membership of the international community is perhaps the defining change. The decolonisation process, of course, was highly complex and had a great many causes, but it is very plausible that it was sparked by the actions and rhetoric of the powers during and in the aftermath of WWI. There is a sense that they began the decolonisation process unintentionally – as Holland notes, for example, ‘the territorial zenith of modern colonialism was attained only in 1919’,¹⁴⁸ long after the wartime actions of Europe’s leaders had made some form of decolonisation process inevitable.

¹⁴⁸ RF Holland, *European Decolonization 1918-1981: An Introductory Survey* (MacMillan Education 1985) 1.

3.1 WWI Rhetoric: Lenin and Wilson on Self-Determination

The First World War was a globalised European war. The main participants were European powers, but the involvement of the colonies held by those powers resulted in a truly global war. The colonies not only provided vital supplies to both sides during the conflict but also provided manpower to bolster the European armies,¹⁴⁹ and it was thus clear to both sides that by ridding the other of its colonial supply-chain they could gain a considerable advantage. In due course, therefore, the colonies became frontlines, both as direct theatres of engagement and battlegrounds of ideas.¹⁵⁰ Wishing to destabilise enemy colonies and guarantee the loyalty of their own, both sides promised greater independence or full self-governance in an effort to win and keep allies.¹⁵¹

That process only increased with the rise to power of the Bolsheviks in Russia. The right of nations to self-determination was a mainstay of Lenin's political thought, and was the official policy of the Bolshevik movement.¹⁵² According to Lenin's theory, the actualised right of those nations that wished it to secessionary self-determination was a first and necessary step towards an end of nationalism and, ultimately, the great socialist awakening.¹⁵³ It was, Lenin argued, the duty of all to reject nationalism in all its forms, yet self-determination he divorced from nationalism per se, identifying it as a necessary aspect of a declaration that all nations are equal in rights.

In this situation, the proletariat of Russia is faced with a twofold or, rather, a two-sided task: to combat nationalism of every kind, above all, Great-Russian nationalism; to recognise, not only fully equal rights for all nations in general, but

¹⁴⁹ Henri Grimal, *Decolonization: The British, French, Dutch and Belgian Empires 1919-1963* (Stephan De Vos tr, Westview Press 1978) 9.

¹⁵⁰ Musgrave (n 130) 15.

¹⁵¹ *ibid* 15–17.

¹⁵² *ibid* 17–18.

¹⁵³ Vladimir Ilich Lenin, 'The Right of Nations to Self-Determination' in Julius Katzer (ed), Bernard Isaacs and Joe Fineberg (trs), *V I Lenin: Collected Works* (Progress Publishers 1964) 413.

also equality of rights as regards polity, i.e., the right of nations to self-determination, to secession.¹⁵⁴

Lenin's thought on self-determination was to prove to be highly influential.

1919 saw the end of the war, and the defeat of Germany, Austria-Hungary and Turkey. By that time most of the colonies of the Central Powers had fallen into Allied hands, and it became increasingly important to determine their future.¹⁵⁵ It was the leaders of the Russian revolution who first advocated that the colonies be permitted to self-determine, but their calls were swiftly echoed by others.¹⁵⁶ In particular, Lenin's call for self-determination influenced Henry Balfour—the first to moot the idea of international control of the territories—whose ideas were in turn taken up (most influentially) by Woodrow Wilson.¹⁵⁷

During the course of the War and the subsequent peace process, Wilson became a strong advocate of self-determination, although it seems clear that his was a narrower conception than that advocated by Lenin. In January 1917, Wilson addressed a joint session of Congress. His address was entitled 'Peace Without Victory', and in the course of the speech he laid out a vision for peace in Europe which, he hoped, would encourage the Central Powers to submit to a negotiated ceasefire. Central to his vision of a stable Europe was the principle of political self-determination:

No peace can last, or ought to last, which does not recognize and accept the principle that governments derive all their just powers from the consent of the

¹⁵⁴ *ibid* 453–54.

¹⁵⁵ The League of Nations, *The Mandates System: Origin - Principles - Application* (Series of League of Nations Publications 1945) 13.

¹⁵⁶ *ibid* 14.

¹⁵⁷ *ibid* 14–15.

governed, and that no right anywhere exists to hand peoples about from sovereignty to sovereignty as if they were property.¹⁵⁸

It is not clear from this passage whether Wilson was advocating a division of contested European territories along national lines in accordance with the wishes of their inhabitants, or whether his goal was to ensure that the war would not result in the acquisition of territories by either side. It may be indicative, though, that the impermissibility of territorial acquisitions was the focus of Wilson's letter to the Pope of the 27th August 1917.¹⁵⁹

Although it seems clear that Wilson was not seeking to institute a right to secessionary self-determination, nor to establish definitive principles for the determination of territorial claims, he insists on the superiority of the rights of 'peoples' over the rights of 'Governments'. All peoples, he argues, have an equal right to freedom and self-government. These statements establish Wilson's commitment to political self-determination, and his conviction that the peace process in Europe should take self-determination principles into consideration. In the early part of 1918, his thoughts on the peace process were to be refined and formalised in his famous 'Fourteen Points' speech of January 1918. Wilson's fourth point stated that there must be:

A free, open-minded, and absolutely impartial adjustment of all colonial claims, based upon a strict observance of the principle that in determining all such questions of sovereignty the interests of the populations concerned must have equal weight with the equitable claims of the government whose title is to be determined.¹⁶⁰

While the address was not a ringing endorsement of self-determination, Wilson established that the will of the population was a factor to be considered in the determination of colonial claims. Cassese is, of course, correct to strike the cautionary note when he comments that for Wilson 'self-determination should not be the sole or even the paramount yardstick in this area,

¹⁵⁸ Woodrow Wilson, 'Peace Without Victory' (22 January 1917).

¹⁵⁹ Letter from Woodrow Wilson, 'Reply to the Pope of 27th August 1917' (27 August 1917).

¹⁶⁰ Woodrow Wilson, 'Fourteen Points' (8 January 1918). [Emphasis added].

but must be reconciled with the interests of colonial powers.¹⁶¹ Nevertheless, it is difficult to overstate the importance of the idea that colonial peoples should be given some measure of influence over their future circumstances.

Peoples are not to be handed about from one sovereignty to another by an international conference or an understanding between rivals and antagonists. National aspirations must be respected; peoples may now be dominated and governed only by their own consent. "Self-determination" is not a mere phrase. It is an imperative principle of actions which statesmen will henceforth ignore at their peril.¹⁶²

Although it would be many years before the idea would achieve general acceptance, Wilson had set in motion the creation of a right to *colonial self-determination*. Although colonial self-determination shares a similarity of outcomes with the secessionary form, its ideational foundations are distinct (it is more closely connected ideationally to the political than the secessionary form), and it merits its own category because of its political status. In 1918 Wilson began a process which would eventually yield a political conviction that colonialism is inherently reprehensible, and that colonial peoples should be granted self-government.¹⁶³ In determining the form that self-government should take in any particular case, self-determination became the accepted tool of the international community.

¹⁶¹ Cassese (n 3) 21.

¹⁶² Woodrow Wilson, 'President Wilson's Address to Congress, Analyzing German and Austrian Peace Utterances' (11 February 1918).

¹⁶³ I refer, here, to colonialism as a whole. Although individual cases of colonial rule had previously been seen as illegitimate, and although colonialism was often (if not always) seen as illegitimate by those under colonial rule (a prime example is Haiti under French rule pre-1804), the international community continued to recognise colonial rule as acceptable, or even laudable—for many years colonialism was arrogated as part of a "civilising mission"—and the great powers were understood to have a perfect right to continued possession of the colonial holdings. 1918 marks a watershed moment: before this, claims by colonies to independence were generally justified on the basis of mistreatment or other failure by the colonial power (and thus fall more readily under the heading of remedial self-determination). In the years that were to follow, however, it was increasingly widely believed that colonies have a right to independence because of their status as such, and not only as a result of abuse by the colonial power.

3.2 *The Mandates System*

The end of the First World War left the international community with a dilemma over the colonial possessions of the defeated Central Powers. While it was considered unacceptable for the colonies to revert to their pre-war masters, many States were reluctant to see the empires of France and the United Kingdom grow yet larger. Their answer was to place the colonies into international stewardship, under a system devised by General Smuts.¹⁶⁴ Smuts considered that the task of administering the territories could not practicably be carried out at the international level, and so proposed a system of *mandates*.¹⁶⁵ Article 22 of the League of Nations Covenant established the mandates system:

To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilisation and that securities for the performance of this trust should be embodied in this Covenant.¹⁶⁶

Rodríguez-Santiago describes this as an embryonic form of the right to colonial self-determination that would later evolve under the auspices of the United Nations: individual States would be given responsibility for Mandated territories under the supervision of the League, and the principle was established that the purpose of the arrangement was the care and development of the territories, and not the ownership of or profit from them.¹⁶⁷

The system has been described by Wright as a form of tutelage. The colonies of the defeated powers were placed under the control of one or more of the allied powers to hold in trust on

¹⁶⁴ The League of Nations (n 155) 16–17.

¹⁶⁵ *ibid.*

¹⁶⁶ Covenant of the League of Nations, 28 April 1919, Article 22.

¹⁶⁷ Rodríguez-Santiago (n 11) 213.

behalf of the international community.¹⁶⁸ While the colonial possessions of the European powers that remained outside the Mandates system were conceived as the property of those States, the Mandate territories were treated quite differently. Callahan observes, for example, that the Mandate territories were often subject to better treatment than the Mandatory's own colonial possessions.¹⁶⁹ A similar distinction can be seen in that, while the Mandatories tended to regard their own colonies as permanent possessions over which their rights were absolute, it was accepted that the ultimate goal of the Mandates was the independence of the territories:

[T]he phrase “peoples not *yet* able to stand by themselves” is used [in Article 22 of the League Covenant]. It follows from this and from the very conception of tutelage that this mission is not, in principle, intended to be prolonged indefinitely, but only until the peoples under tutelage are capable of managing their own affairs.¹⁷⁰

While the suggestion that a people should be denied independence until such time as Western powers considered them sufficiently “civilised” is markedly distasteful, there can be no doubt that a declaration that these territories were to be guided towards independent statehood was enormously powerful. Wright argues that “[t]he notion that the eventual independence of dependencies was inevitable and expedient tended to the notion that it was *a right*.”¹⁷¹ That notion was strengthened yet further when, in 1931, the Permanent Mandates Commission produced a report for the League Council laying down the conditions which, in its opinion, should exist in a Mandate territory before that territory should be granted independence.¹⁷² The PMC did not have the capacity to make demands of the Mandatories in most cases, so the

¹⁶⁸ Quincy Wright, *Mandates under the League of Nations* (University of Chicago Press 1930) 11. [Footnotes omitted].

¹⁶⁹ Michael D Callahan, *A Sacred Trust: The League of Nations and Africa 1929-1946* (Sussex Academic Press 2004) 17.

¹⁷⁰ The League of Nations (n 155) 23.

¹⁷¹ Wright (n 168) 12. [Emphasis added].

¹⁷² Grimal (n 149) 18.

conditions were ‘merely suggestions’, and not stipulations.¹⁷³ Nevertheless, the duty to report to the PMC contributed to a sense that territories should be prepared for their eventual independence.¹⁷⁴

The League of Nations did not live up to its promise. It failed to prevent the outbreak of war between two of its members, Japan and China, in 1931 and, through its silence, condoned Mussolini’s action in Ethiopia in 1936.¹⁷⁵ Following the Second World War the League of Nations was replaced with the United Nations (UN). In many ways, however, the Mandates system was to prove stronger than the League. Callahan notes that when Japan pulled out of the League in 1935 it maintained its Mandates, retained its seat on the Permanent Mandates Commission, and continued to send the proper reports and representatives to the Commission.¹⁷⁶ Thus when the UN Charter was negotiated in 1945 it was not only the practical provisions on the administration of the Mandate territories that were to be recreated in the Trusteeship system; many of the ideas of self-government and self-determination that the Mandates system had engendered found textual expression in the new system.

3.3 The United Nations and the Trusteeship System

On the 26th June 1945, the delegates to the San Francisco Peace Conference concluded the Charter of the United Nations, and replaced the League’s Mandates system with a system of Trusteeship. Although the systems were not identical, many of the Mandates system’s central

¹⁷³ *ibid.*

¹⁷⁴ Nevertheless, as Rodríguez-Santiago notes, there was no intention at the moment of the drafting of the League Covenant to create anything more extensive or powerful than a gradual movement towards independence that would remain the discretion of the PMC and the Mandatory powers. No right to self-determination at the behest of the people of the territory was envisaged. Rodríguez-Santiago (n 11) 213.

¹⁷⁵ Dietmar Rothermund, *Decolonization: The Routledge Companion* (Routledge 2006) 50.

¹⁷⁶ Callahan (n 169) 44–45.

features were incorporated into the Trusteeship system with only minor changes. Unlike the Mandates system, however, the Trusteeship system was given a textual foundation in the Charter: Chapter XII is devoted to the system, and Chapter XIII sets out the powers and remit of the Trusteeship Council.

The anaemic textual basis of the Mandates system can be contrasted directly with the full and thorough expression of the principles and powers associated with Trusteeship in the Charter. While the principles that underpinned the Mandates system were largely unwritten and were often vague, the Charter codified the principles applicable to the Trusteeship system, and made several significant changes to the language of the system which point to a more explicit focus on the ultimate independence of Trust territories.¹⁷⁷ Not only did the Charter create an obligation on the Trustee to progressively develop the infrastructure and institutions of the Trust territory towards the self-government or independence of the population,¹⁷⁸ but Article 76 declared the relevance of self-determination in that endeavour: the ‘freely expressed wishes of the peoples concerned’ are declared to be relevant to the development towards either self-government or independence.

In one respect, however, the Charter was far more radical than the League: the Charter even purported to give certain rights and entitlements to the populations of colonial (non-self-governing) territories that were not the subject of a Trust. While Chapter XII of the Charter laid down the principles to be applied specifically to the Trusteeship system, Chapter XI sets down principles for the administration of all non-self-governing territories:

Members of the United Nations which have or assume responsibilities for the administration of territories whose people have not yet attained a full measure of

¹⁷⁷ Charter of the United Nations and Statute of the International Court of Justice, signed 24 October 1945, in force 24 October 1945, Chapter XII, Article 76-76(b).

¹⁷⁸ Dietrich Rauschning, ‘Article 76’ in Bruno Simma and others (eds), *The Charter of the United Nations: A Commentary*, vol 2 (3rd edn, Oxford University Press 2012) 1852.

self-government recognise the principle that the interest of the inhabitants of these territories are paramount[.]¹⁷⁹

Article 73 defines several aims which the States involved must pursue in the interests of the inhabitants. Prominently placed among these is the obligation to develop self-government in the territories.¹⁸⁰ As Rothermund notes, the Charter is careful to refer only to ‘self-government’, and not to ‘self-determination’ or to ‘independence’.¹⁸¹ Nevertheless, for the first time it had been declared (and, by the Colonial powers, accepted) that the powers had certain obligations vis-à-vis their colonies. Other provisions, too, point to an emerging sense that the colonies and the trust territories were of a kind. While the Mandates system applied only to those territories stripped from the defeated Central Powers in the aftermath of WWI, the Trusteeship system was designed to apply to the existing mandated territories, territories ‘detached from enemy states as a result of the Second World War’ and even ‘territories voluntarily placed under the system’.¹⁸² This expansion explicitly made the system relevant to colonies held by States in their own capacities. While States were under no obligation to place colonies into the Trusteeship system, it was nevertheless made clear that there was no difference in kind between the colonies stripped from the defeated powers in both wars, and the colonies held by the victors. This declaration of equivalency between the former Mandates and other colonies naturally contributed to a sense that the same principles should apply to each.

Notably, however, the Charter stops short of creating a right to independence, even for those territories under international Trusteeship. Self-government, it seems clear, does not amount

¹⁷⁹ UN Charter, Chapter XI, Article 73.

¹⁸⁰ UN Charter, Chapter XI, Article 73(b).

¹⁸¹ Rothermund (n 175) 52.

¹⁸² UN Charter, Chapter XII, Article 77(a)-(c).

to independent statehood, but is better analogised to a form of devolution.¹⁸³ In practice many Trust territories did achieve independence within a few decades and the practice of the UN and its members was ultimately to institute independence as the goal of Trusteeship, and to extend that principle to apply to all non-self-governing territories. Over time, therefore, a right to colonial self-determination capable of resulting in the formation of an independent State was to emerge.

4. Self-Determination in the Law of the United Nations

4.1 The Charter of the United Nations

There can be no doubting the importance of the Charter of the United Nations for modern international law. As Tomuschat has observed, '[t]he present-day world order rests entirely on the Charter',¹⁸⁴ and some authors have even characterised the Charter as a constitution of the international community.¹⁸⁵ Its unique status and normative force are based not only on the fundamental organisational principles of the international system with which it deals, but also on its status as a treaty of universal application. Uniquely among treaties all acknowledged States have accepted the obligations it imposes as a matter of conventional international law; indeed, the list of the Charter's parties is sometimes taken to be a definitive list of the States of the world.¹⁸⁶ The legal status of references to self-determination in the Charter, and the forms of self-determination they invoke, are uncertain, however.

¹⁸³ Rothermund (n 175) 52.

¹⁸⁴ Christian Tomuschat, 'Foreword' in Christian Tomuschat (ed), *The United Nations at Age Fifty: A Legal Perspective* (Kluwer Law International 1995) ix.

¹⁸⁵ Bardo Fassbender, 'The United Nations Charter as Constitution of the International Community' (1998) 36 *Columbia Journal of Transnational Law* 529; and discussion in Aoife O'Donoghue, *Constitutionalism in Global Constitutionalisation* (Cambridge University Press 2014) 178–80.

¹⁸⁶ Some authors go so far as to argue that UN Membership is now constitutive of statehood. See, e.g. John Dugard, *Recognition and the United Nations* (Grotius Publications Limited 1987) 79; and *contra* Nii Lante Wallace-

The most significant Charter statement of self-determination is Article 1(2), which declares that:

The Purposes of the United Nations are:
[...]
2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace[.]¹⁸⁷

The status of Article 1 of the Charter is among the least certain of the Charter provisions, and it remains unclear whether it constitutes a binding obligation on the Member States, or merely imposes obligations on the Organisation.¹⁸⁸ A textual approach to the article suggests, in the first place, that these are purposes of the Organisation, and not of the members. It is addressed to the Organisation, and not to the member States, as clearly demonstrated by Article 1(4), which lists as a purpose '[t]o be a centre' for the facilitation of efforts towards those ends of the Organisation.¹⁸⁹ The part clearly refers to a body (singular) which is the subject of the obligation, and as such the provision cannot apply to a multitude of actors. It may also be observed, with Wolfrum, that the language of the article 'is more appropriate for political objectives rather than for legally binding obligations.'¹⁹⁰

In their respective analyses of the Charter, both Kelsen and Cassese conclude that Article 1 creates no obligations on UN Members. Kelsen begins his analysis with the first purpose listed, that of maintaining international peace and security. The emphasis of the provision, in

Bruce, *Claims to Statehood in International Law* (Carlton Press 1994) 59–60. Possible exceptions to this rule include the Republic of China (Taiwan), Vatican City, the Cook Islands, Kosovo, and Palestine.

¹⁸⁷ UN Charter, article 1(2).

¹⁸⁸ Rüdiger Wolfrum, 'Article 1' in Bruno Simma and others (eds), *The Charter of the United Nations: A Commentary*, vol 1 (3rd edn, Oxford University Press 2012) 108; Chadwick (n 11) 7.

¹⁸⁹ UN Charter, article 1(4).

¹⁹⁰ Wolfrum (n 188) 108.

Kelsen's opinion, is preventative.¹⁹¹ its focus is on the pacific settlement of international disputes,¹⁹² and as such it is institutional in focus, centring on the infrastructure created by the Charter with a view to the maintenance of peace – the General Assembly, the Security Council and the ICJ.¹⁹³ Article 1 therefore sets down the 'function[s] of the Organization', while the 'corresponding' 'obligation[s] of the Members' can be found in Article 2.¹⁹⁴

Kelsen also argues that Article 1 could not create legal rights.

[I]t is highly problematic to refer in a legal instrument to rights without referring to the corresponding duties, since legally there exists no right of an individual without a corresponding duty on another individual; and if the right is a "freedom," not without a corresponding duty of the government.¹⁹⁵

According to Kelsen, not only does the Charter not stipulate *which* rights individuals should have, nor *who* should have the responsibility for ensuring that those rights are respected and fulfilled, but it also fails to provide any form of redress for individuals whose rights are breached.¹⁹⁶ Indeed, the Statute of the ICJ specifically excludes the possibility that individuals could have standing before it.¹⁹⁷ Kelsen concludes that '[a]ll the formulas concerned establish purposes or functions of the Organisation, not obligations of the members'.¹⁹⁸ Cassese agrees, and he argues that self-determination

¹⁹¹ Hans Kelsen, *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems* (Stevens & Sons 1951) 15.

¹⁹² *ibid*; UN Charter, Article 1(4).

¹⁹³ Kelsen (n 191) 15.

¹⁹⁴ *ibid*.

¹⁹⁵ *ibid* 29.

¹⁹⁶ *ibid* 29–33.

¹⁹⁷ *ibid* 32–33; Statute of the International Court of Justice, article 34(1).

¹⁹⁸ Kelsen (n 191) 29.

[W]as envisaged primarily as a programme or aim of the Organization [...] the Charter did not impose direct and immediate legal obligations on Member States in this area[.]¹⁹⁹

Rather than imposing what may have become highly burdensome obligations on States, it ‘merely laid down [the] many *lofty goals of the Organization*. The Threat to State interests was thus minimized.’²⁰⁰ There are, therefore, many textual indications that the Article does not impose obligations on the member States. Nevertheless, there are suggestions that States have considered Article 1 to be binding, both during the drafting of the Charter and subsequently.

During the San Francisco conference, the categorisation of the statements reflecting the values of the Charter and the Organisation as preambular, purposes or principles was discussed by Subcommittee I/1/A.²⁰¹ Although it is clear that the subcommittee understood the three parts as having a differing emphasis,²⁰² it appears they did not draw the sharp distinctions between the parts that conventional understanding has done, finding that all parts of the Charter (including the preamble) were capable of creating judiciable rights:

The provisions of the Charter are, in this case, as in any other legal instrument, indivisible. They are equally valid, binding and operative. [...] May the understanding of these remarks dispel any doubts and quiet any apprehensions as to the validity and value of the Charter, whether called Preamble, Chapter I or Chapter II.²⁰³

¹⁹⁹ Cassese (n 3) 43.

²⁰⁰ *ibid.*

²⁰¹ United States of America Department of State, ‘Report of the Rapporteur to Subcommittee I/1/A to Committee I/1’ in *The United Nations Conference on International Organization; San Francisco, California, April 25 to June 26, 1945: Selected Documents* (United States Government Printing Office 1946) 476.

²⁰² *ibid* 478.

²⁰³ *ibid.*

There are some indications, also, that the subcommittee may have anticipated a wider role for the purposes than simply as a set of standards pertaining to the Organisation. The Rapporteur stated that:

The Purposes form the *raison d'être* of the Organisation. They are the aggregation of the common ends on which our minds, one and all, met; hence the object of our Charter, the signatories of which collectively **and severally** subscribe to.²⁰⁴

Kelsen remarked on the close links between Articles 1 and 2 of the Charter, with many of the provisions existing both as obligations upon the Organisation in the former, and the Parties in the latter, and it may be that this dualism squares the Article 1 circle.²⁰⁵ Article 1 is a mirror, and its reference to self-determination is paralleled (if not by name) in the Article 2(1) guarantee of the equality of member States and the Article 2(4) prohibition on intervention. In its political form the right of self-determination attaches to the population of a State as a whole, and guarantees a choice over the *form* of government; a choice which belongs to that population alone.²⁰⁶ Any external interference with that choice is inimical to the principle underpinning the right, and is illegitimate. Self-determination stands as an affirmation that no one peoples' interests may be considered superior to another's, such that the first can dictate the terms of the latter's national life. The principle thus guarantees both the equality of peoples (and thus the equality of polities) and the prohibition on intervention, which the Charter expresses as rights of "peoples" (Article 1(2)) and as corresponding duties of States (Articles 2(1) and 2(4)). This appears, therefore, to meet Kelsen's criterion of a true legal right; that is to say, one which carries with it a corresponding duty and a potential remedy.²⁰⁷

²⁰⁴ *ibid.* [Italics in original, bold emphasis added].

²⁰⁵ Kelsen (n 191) 15.

²⁰⁶ See above p.34-39.

²⁰⁷ Kelsen (n 191) 29.

However, the Charter appears to create such a right only in relation to one part of the political self-determination norm. As discussed above, political self-determination has both inward- and outward-facing aspects, which respectively stand for the principle that the individuals who comprise a social-political system should not be excluded from the determination of the form which that system will take (sometimes referred to as popular sovereignty), and the principle that no others who are outside the system should substitute their judgment for that of the individuals within it (non-interference).²⁰⁸ Only the second of these, the outward-facing aspect of the right, is expressed as a true right under the Charter.²⁰⁹

Although of restricted scope, a recognition in the Charter of the principle of political self-determination is of great importance, and may represent a significant turning-point. As has been argued in this chapter, the political form of self-determination is the best established species of the self-determination genus, with roots as a legitimacy-claim in the American and French revolutionary declarations of the 18th Century.²¹⁰ It is this form of self-determination which, according to the hypothesis examined in this thesis, has been established as the structural principle of the modern international legal system, and which is both driving and being sustained by the ongoing process of the humanisation of international law which has been identified by Peters and others,²¹¹ as part of a recursive process.²¹² There can be little

²⁰⁸ See above, p.37-38.

²⁰⁹ Chadwick (n 11) 10.

²¹⁰ See above, p.41-48.

²¹¹ Anne Peters, 'Humanity as the A and Ω of Sovereignty' (2009) 20 *European Journal of International Law* 513; Anne Peters, *Beyond Human Rights: The Legal Status of the Individual in International Law* (Jonathan Huston tr, Cambridge University Press 2016); see also Christian Tomuschat, 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century' (1999) 281 *Collected Courses of the Hague Academy of International Law* 9; Antônio Augusto Cançado Trindade, 'International Law for Humankind: Towards a New Jus Genitum (I)' (2005) 316 *Collected Courses of the Hague Academy of International Law* 9; Ruti Teitel, *Humanity's Law* (Oxford University Press 2011).

²¹² Anthony Giddens, *The Constitution of Society: Outline of the Theory of Structuration* (Polity Press 1984) 2.

doubt that the inclusion of this statement of principle in the Charter and subsequent developments have contributed to that process.

4.2 Resolutions 545(VI) and 637(VII)

In the years that followed the adoption of the Charter, the status of self-determination as a legal norm was increasingly acknowledged. In 1952 the General Assembly passed resolution 545(VI),²¹³ by which it decided to include ‘an article on the right of all peoples and nations to self-determination in reaffirmation of the principle enunciated in the Charter’ in the International Covenants on Human Rights, which were then being drafted.²¹⁴ This resolution has a dual significance. Not only can this statement assist in interpreting the reference to self-determination in the Covenants, but it can also aid in interpreting the Charter. The resolution is an example of the subsequent practice of the organisation, and indicates the interpretation of the Charter reference to self-determination to which the States Members present collectively subscribed:²¹⁵ the Covenants’ references to self-determination were understood as invoking the same principle as the Charter, which the States present clearly understood as a reference to the political form. During the debate it was stated that the right to self-determination ‘should not be confused with the rights of minorities’,²¹⁶ and the discussions referred to a ‘true right’ comprising two elements: domestically it ‘signified the people’s right to self-government and from the external point of view their independence.’²¹⁷ This confirms

²¹³ UNGA Res 545 (1952) GAOR 6th Session 36.

²¹⁴ *ibid.*

²¹⁵ Anthony Aust, *Modern Treaty Law and Practice* (2nd edn, Cambridge University Press 2007) 241–43; see also Andrea Bianchi, ‘Law, Time, and Change: The Self-Regulatory Function of Subsequent Practice’ in Georg Nolte (ed), *Treaties and Subsequent Practice* (Oxford University Press 2013).

²¹⁶ Cristescu, *The Right to Self-Determination: historical and current development of the basis of United Nations Instruments*, Report of the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, E/CN.4/Sub.2/404/Rev.1, p.5, citing *Official Records of the General Assembly, Sixth Session, Third Committee*, 397th meeting, para 5.

²¹⁷ *ibid.*, citing *Official Records of the General Assembly, Sixth Session, Third Committee*, 397th meeting, para 5.

the conclusion above—that political self-determination had become a legal right under the Charter, at least in certain of its aspects—but other forms did not receive the same approval. The right of national minorities to self-determination was rejected, and it was understood that self-determination carried with it no right to secession or to disrupt the national unity.²¹⁸

A contrast may be drawn with resolution 637(VII), which deals with the substance of the right which was to appear in the Covenants.²¹⁹ It declared the right to self-determination to be a ‘prerequisite to the full enjoyment of all fundamental human rights’, and recommended that Members ‘uphold’ the principle.²²⁰ Two forms of self-determination are engaged in these statements. The majority of references to self-determination which appear in resolution 637 seem to refer to the Charter’s references to political self-determination, and are therefore best seen as re-statements of that right.²²¹ Certain provisions differ, however, and make reference to decolonisation and self-determination’s application to non-self-governing territories.²²² The resolution therefore appears to support the proposition that two forms of self-determination were acquiring a legal status: political and colonial self-determination.

It did not, however, develop that legal status, and nor does it seem to have contributed significantly to the formation of a wider customary right either of political or of colonial self-determination. Although it received widespread support, it probably did not demonstrate an *opinio iuris* of States voting for it. On the contrary, the resolution speaks of a ‘principle of’ rather than a ‘right to’ self-determination; and refers to the ‘right to’ self-determination only

²¹⁸ *ibid.*

²¹⁹ UNGA Res 637 (1952) GAOR 7th Session 26.

²²⁰ *ibid* [1].

²²¹ See *ibid*, preamble.

²²² *ibid* [2].

in the context of non-self-governing territories, where it almost certainly retained the ambit of the weak right contained in the Trusteeship provisions of the Charter. Subsequent resolutions, however, did crystallise a customary norm.

4.3 Resolution 1514(XV)

Resolution 1514(XV), the '[d]eclaration on the granting of independence to colonial countries and peoples',²²³ represented a significant departure from the General Assembly's previous references to self-determination, and was 'one of the most significant contributions the United Nations has made to developing the concept'.²²⁴ For the first time, the General Assembly sought not only to re-state, but to *develop* the law on self-determination under the Charter.

Self-determination as formulated in the declaration refers exclusively to the colonial form. The preamble identifies those to whom the right would apply as 'dependent peoples',²²⁵ and declares that 'an end must be put to colonialism'.²²⁶ The operative paragraphs condemn '[t]he subjection of peoples to alien subjugation, domination and exploitation',²²⁷ and mandate action in respect of 'Non-Self-Governing Territories or all other territories which have not yet attained independence'.²²⁸ It was also clear that the principles applied could not be employed outwith the colonial context. The declaration specifically excludes their application in other cases, stating that:

²²³ UNGA Res 1514 (1960) GAOR 15th Session 66.

²²⁴ Cristescu (n 216) [39].

²²⁵ UNGA Res 1514 (n 223) preamble.

²²⁶ *ibid.*

²²⁷ *ibid.*, [1].

²²⁸ *ibid.*, [5].

Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.²²⁹

Significantly, this statement shows that the declaration regards colonial and secessionary self-determination as unrelated concepts. There is an understandable tendency to connect these forms of self-determination, which often result in similar outcomes (*viz.* the removal of a territory from the control of a State power and its establishment as a new State or its integration with another State). It was the view of the General Assembly, however, that that these are separate ideas, hence the declaration's fulsome endorsement of the colonial form, while secession was declared unlawful.

Although a partial right to colonial self-determination had been established as part of the Mandate system (and then further developed under the Trust system), it was in this resolution that the ambit of that right was extended from trust territories to all non-self-governing territories. It speaks in absolutes: the 'subjection of peoples to alien subjugation' is a 'denial of fundamental human rights' and 'is contrary to the Charter',²³⁰ powers are to be transferred to the populations of non-self-governing territories 'without any conditions or reservations',²³¹ the aim of the declaration is to bring about the 'end of colonialism in all its manifestations'.²³² It seems clear, too, that the declaration was more than a political statement, and was capable of contributing to the formation of custom as an expression of the *opinio iuris* of States. The resolution mandates action formulated in specific and absolute terms, requiring that '[i]mmediate steps' be taken to grant non-self-governing territories independence 'in

²²⁹ *ibid.*, [6].

²³⁰ *ibid.*, [1].

²³¹ *ibid.*, [5].

²³² *ibid.*, preamble.

accordance with their freely expressed will and desire'.²³³ It demands action by the Trustee powers, an action within the General Assembly's competence under the trust system.²³⁴ The resolution also attracted widespread support, passing by 89 votes in favour with nine abstentions and no State voting against, and it appears that those States members involved in the drafting of the declaration accepted its significance and regarded it as a law-creating document:

It was considered that the Declaration revitalized the spirit of the Charter restored strength to the Charter provisions on self-determination and gave a new sense of reality and greater validity to the Universal Declaration of Human Rights. The new Declaration would be an epoch-making document, on an equal footing with the Charter and the Universal Declaration.²³⁵

It seems likely that the declaration was sufficient to crystallise a norm of customary law relating to colonial self-determination and thus to extend the ambit of the norm beyond trust and mandate territories to all non-self-governing peoples. It also seems clear, however, that it did not affect the extent or legal status of self-determination in its other forms.

4.4 International Human Rights Covenants

The International Human Rights Covenants (the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights) are twin treaties which were created in order to render the rights proclaimed in the Universal Declaration of Human Rights enforceable. The Covenants have a common first Article, which provides that:

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

[...]

²³³ *ibid.*, [5].

²³⁴ *Legal Consequences for State of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, (1971) ICJ Reports 16, [71-72].

²³⁵ Cristescu (n 216) [41].

3. The States Parties to the present convention, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.²³⁶

Although the Article refers again to the decolonisation context, and so probably constitutes a re-statement of the right of non-self-governing peoples to colonial self-determination,²³⁷ the major focus of the common Article is on the right of ‘all peoples’ to ‘freely determine their political status’.²³⁸ Such language is more appropriate to a right to political self-determination, or the right of a population to institute the political and economic system of their choosing without outside interference, than a right to colonial or to the other forms of self-determination. Conspicuously, also, the Article does not limit the scope of the right to colonial self-determination – rather, it refers to ‘all peoples’. It seems equally clear, though, that the references to ‘peoples’ was understood to mean the population of States and of colonised territories, and not sub-State groups. Reference to the *travaux préparatoires* suggests that the States Parties did not envisage a right to secessionary self-determination:

In paragraph 1 of the article, [Venezuela] understood the term “peoples” in the most general and unqualified sense, and therefore as not applicable to racial, religious, or other groups or minorities. [... Self-determination means] freedom for all peoples and nations to manage their affairs in all respects without the intervention of another people or nation.²³⁹

²³⁶ International Covenant on Civil and Political Rights, signed 16 December 1966, in force 23 March 1976, 999 UNTS 171; International Covenant on Economic, Social and Cultural Rights, signed 16 December 1966, in force 3 January 1976, 993 UNTS 3, Article 1(1)-(3).

²³⁷ Macklem notes that those States representatives drafting the Covenants certainly had the colonial context firmly in mind. Macklem (n 11) 94–95.

²³⁸ ICCPR/ICESCR (n 236) Article 1(1).

²³⁹ *Official Records of the General Assembly, Tenth Session, Third Committee*, 646th meeting, para 42; see also Interpretive Declaration of the Republic of Indonesia to the ICCPR made on the occasion of Indonesia’s accession to the ICCPR, 23 February 2006, via <www.treaties.un.org> accessed 6/3/15.

It can be concluded, therefore, that the Covenants concerned primarily political and secondarily colonial self-determination, and did not institute a right to secessionary or remedial self-determination.

The formulation of the right to political self-determination in the Covenants may have extended the ambit of the right, however. Prior to the conclusion of the Covenants, as noted above, political self-determination was vulnerable to the challenge that an obligation without a corresponding remedy cannot be a legal obligation, properly so called.²⁴⁰ Although the outward-facing aspect of political self-determination—guaranteeing non-interference—had achieved the status of an enforceable right under the Charter, political self-determination remained a “half-right”. Its internal facet—guaranteeing the equality of population groups in determining the form of a State’s governance—lacked an enforceable remedy or sanction. The Covenants may have remedied that lack, by creating a right to political self-determination enforceable against States Parties.²⁴¹ In that way the Covenants may have facilitated the emergence of political self-determination as a full right opposable to the States Parties.

It is also significant that the Article is common to both Covenants. Rather than being a right of the same kind as those enumerated in the Covenants, its verbatim inclusion in both documents suggests that it was seen as having a different, and more basic, character. These are matters which, it seems to declare, come prior to the subdivision of human rights into civil and political or economic social and cultural. To that extent it receives a treatment different even to the right to life, which appears in the list of civil and political rights only. There can

²⁴⁰ Kelsen (n 191) 29.

²⁴¹ Although Crawford notes some remaining ambiguity on this point, he concludes that there is ‘no basis for excluding Article 1 in principle from the complaints procedures’. Crawford (n 11) 4–5.

hardly be a more eloquent indication of the fundamental character which the norm of political self-determination was understood to possess.

4.5 Declaration on Friendly Relations

In 1970 the United Nations General Assembly agreed Resolution 2625(XXV).²⁴² The Resolution approved the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (Declaration on Friendly Relations), the text of which was annexed to the Resolution. It is doubtless the single most significant document on self-determination produced under the auspices of the United Nations,²⁴³ in that the declaration not only materially develop the law on self-determination, but it cemented its legal status.

The declaration is customary in its entirety. In its *Nicaragua* decision the ICJ declared the Declaration to be customary international law, holding that the Declaration was more than a mere ‘reiteration or elucidation’ of the Charter,²⁴⁴ but that ‘the adoption by States of this text afford[ed] an indication of their *opinio iuris* as to customary international law’.²⁴⁵ In its Advisory Opinion on Kosovo the Court cited its judgment in *Nicaragua*, confirming that the Declaration ‘reflects customary international law’.²⁴⁶ The Court did not confine its comment to a section of the declaration, nor point to such a limit in the *Nicaragua* judgment, and should

²⁴² UNGA Res 2625(XXV), 24 October 1970.

²⁴³ Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, annexed to UNGA Res 2625, *ibid*.

²⁴⁴ *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)*, Merits, Judgment, (1986) ICJ Reports 14, [188].

²⁴⁵ *ibid* [191].

²⁴⁶ *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, (2010) ICJ Reports 403, [80].

be interpreted as a recognition of the status of the declaration as a whole. It is also clear, as the Court apprehended when it examined the text of the Declaration during the proceedings in *Nicaragua*, that the obligations found in the Declaration go beyond those of the Charter. The Declaration was therefore not merely a source of law, but a source of new law.

At first sight the declaration appears simply to restate those forms of self-determination which, as discussed above, already existed in the law of the Charter and of the United Nations. The Declaration again emphasises the right of colonial peoples to self-determination and reiterates the conviction that ‘subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of [self-determination], as well as a denial of fundamental human rights, and is contrary to the Charter.’²⁴⁷ It also restates the rights of peoples to political self-determination:

[A]ll peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter.²⁴⁸

Once more, it seems clear that “peoples” was understood to mean the populations of States, and not sub-State groups. The declaration itself excludes the application of the principle to break up the State in very definite terms:

Nothing in the forgoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States[.]²⁴⁹

²⁴⁷ Declaration on Friendly Relations (n 243).

²⁴⁸ *ibid.*

²⁴⁹ *ibid.*

It therefore seems clear that no right to secessionary self-determination was created by the Declaration and, further, that no right to secessionary self-determination then existed in international law.

This “safeguard clause” may have another significance, though. Perhaps surprisingly, the clause does not provide States with an absolute protection against secession, but only a limited one. The clause forbids actions which would break up

[S]overeign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples described above, and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.²⁵⁰

This clause excludes from its protection colonial States, which do not represent the people of the territory without distinction; it excludes entities which have not yet achieved statehood and independence; and (most significantly) it does not protect States which deny their population’s right to internal self-determination, access to government, or full and equal participation in the State’s political life. Some have argued that this amounts to recognition of a legal right to remedial self-determination, and it may be that this conclusion is correct.²⁵¹

However, it would be equally possible to interpret the statement as expressive of a legal *lacuna* – as indicating that while it may be that no permissive rule enabling secession exists, that peoples living in States which do not respect the rights of the whole population to political self-determination are at least *not actively prohibited* from seceding on remedial grounds.

²⁵⁰ *ibid.*

²⁵¹ The proposition is supported by the written submissions of a number of States to the Court in the course of the proceedings in the *Kosovo* Advisory Opinion, as well as academic commentators and ICJ Judges. See, for example, Written Statement of the Netherlands, *Kosovo* Advisory Opinion, [3.6-3.7]; Written Statement of Estonia, *Kosovo* Advisory Opinion, [2.1]; Written Statement of Finland, *Kosovo* Advisory Opinion, [8]; Written Statement of Poland, *Kosovo* Advisory Opinion, [6.8-6.9]; Written Comment of Switzerland, *Kosovo* Advisory Opinion, [60]; Written Statement of Germany, *Kosovo* Advisory Opinion, 32-37; Cassese (n 3) 108–19; Duursma (n 4) 25; Sterio (n 53) 12–13; Rodríguez-Santiago (n 11) 235; Separate Opinion of Judge Cançado Trindade, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion (2010) ICJ Reports 523, [175-181]; Separate Opinion of Judge Yusuf, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion (2010) ICJ Reports 618, [11-12].

Even if, therefore, it is not creative of a legality, it appears at least to be a recognition in principle of the legitimacy of succession *in extremis* by peoples denied political self-determination.

The law on self-determination still largely reflects that set down in the Declaration. Resolution 2625 is, to date, the last of the significant statements made by the General Assembly on self-determination and, although the legal scheme has been clarified and refined by case law both prior to the Declaration's adoption and subsequently, the basic position remains that posited by the declaration in 1970.²⁵² Colonial self-determination is well-established as a legal right attaching to non-self-governing peoples, and the principle that the wishes of the inhabitants of a territory should be of great weight in determining its future status may now have some application beyond the strict definition of a colonised people. Of less certain application is the principle of remedial self-determination, which while it received some endorsement in the Declaration, is still of uncertain status. The same cannot be said of the secessionary form, which was rejected entirely. Perhaps of most significance, though, was the Declaration's treatment of political self-determination. That form of self-determination was strongly reasserted, and the importance of the principle for the modern international legal system was made clear both in the Declaration's statement that 'peoples have the right freely to determine, without external interference, their political status', and that States which fail to 'conduct[] themselves in compliance with the principle of equal rights and self-determination of peoples' or which are not 'possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour' do not automatically receive the strong endorsement of their territorial integrity from which compliant States benefit.²⁵³ These

²⁵² Duursma (n 4) 25.

²⁵³ Emerson points to the Declaration on Non-Intervention (UNGA Res 2131(XX)) as a statement of similar principles: Emerson (n 11) 465–66.

powerful statements demonstrate again the vitally important position which the principle of political self-determination occupies in the post-Charter legal world.

5. Conclusion

This chapter has argued that self-determination, rather than being understood as a unitary or two-sided concept, should be cognised as a genus comprising four distinct “species” of self-determination ideas. These were identified as political, remedial, colonial and secessionary self-determination. Although there are connections between these ideas—particularly, perhaps, between remedial self-determination and the political form—the historical analysis suggests that the ideational foundations of the kinds of self-determination are sufficiently distinct that they should be treated separately. That indicates not only that the legitimacy claims made by each form are distinct, but also that they should be given different statuses and treatment as a matter of international law.

Indeed, a four-part taxonomy of self-determination claims was shown to be helpful in understanding the contested position of the concept at international law. The long-standing uncertainties and apparent dissonances in the legal regulation of the norm (how can an idea be simultaneously reviled as capable of dismantling the international legal order²⁵⁴, and declared to be of *erga omnes*²⁵⁵ and *ius cogens* character?²⁵⁶) can be explained by disaggregating the kinds of claims made. Thus, although the status of remedial self-determination has been left somewhat unclear by the discussion thus far, and although the secessionary form remains widely reviled, it is clear that self-determination of non-self-governing peoples in the colonial context has now been established as a legal right under

²⁵⁴ See e.g. Higgins (n 3) 104; Cassese (n 3) 328; Buchheit (n 3) *passim*.

²⁵⁵ *East Timor* (n 5) [29].

²⁵⁶ Cassese (n 3) 140.

customary law. Of most significance to the wider concerns of this thesis, however, is the position of political self-determination – that principle which stands in its inward facing aspect for the proposition that all individuals and sub-groups within the population of a society should have the opportunity to determine the form of the political structures which apply to the society on conditions of equality, and in its outward-facing aspect that the determination of the form of socio-political organisation which applies in a society is a matter solely for the individuals who make up that society. That idea, long seen as a powerful source of legitimacy, has become a deeply embedded principle of the post-Charter international legal order. It is this principle which, according to the hypothesis examined in this thesis, has been established as a structural principle of the modern international legal system, and which helps to explain the ongoing humanisation of the structural properties—the deep level conceptual foundations—of the international legal system; statehood, personality, sovereignty, obligation, and *ius cogens*, which are discussed in later chapters.

This chapter has introduced the four-part taxonomy of self-determination, and has given examples of the use of the forms identified from different historical periods. The separate ideational foundations of the species of self-determination have been demonstrated, and it has been shown that each stands for a different legitimacy claim, some of which have and some of which have not been accepted as rights claims in international law in the events discussed here, or in the documents produced under the auspices of the United Nations. The next chapter continues and adds to this examination with an appraisal of the treatment of self-determination before judicial bodies in the post-Charter era, and discusses some recent developments.

Two

Self-Determination II: Judicial Treatments of Self-Determination 1945-Present

Roper: So, now you give the Devil the benefit of law!

More: Yes! What would you do? Cut a great road through the law to get after the Devil?

Roper: I'd cut down every law in England to do that!

More: Oh? And when the last law was down, and the Devil turned 'round on you, where would you hide, Roper, the laws all being flat? This country is planted thick with laws, from coast to coast, Man's laws, not God's! And if you cut them down, and you're just the man to do it, do you really think you could stand upright in the winds that would blow then? Yes, I'd give the Devil benefit of law, for my own safety's sake!¹

1. Introduction

Although claims to self-determination have seldom been the direct subject of judicial processes, self-determination claims have been considered in certain curial and quasi-curial processes before national and international bodies. This chapter will build upon the analysis that was conducted in chapter one, and will apply the same four-part taxonomy of self-determination claims to judicial considerations of self-determination. In so doing it will permit a greater focus on the legal status of the various strands of the self-determination idea. While the legal status of the norms was discussed in relation to their development under the auspices of the political organs of the United Nations, the documents considered speak of self-determination in the abstract, and references to it are often vague and imprecise. In these

¹ Robert Bolt, *A Man for All Seasons* (A&C Black 2013) 41–42.

cases, by contrast, the right to self-determination is operationalised: courts, by their nature, deal with specificities in seeking to apply the correct interpretation of the law to the facts. Given this aspect of the judicial function, it is perhaps surprising that both national and international Courts have tended to avoid ruling on the status and scope of the various forms of self-determination (with the exception of colonial self-determination), and that such rulings, where made, are characterised by paucity of detail and a dearth of argumentation. Nevertheless, certain principles may be discerned which assist in an analysis of self-determination.

This chapter examines the major decisions of national and international courts in the post-Charter era. Although there are rare examples of self-determination questions coming before courts before 1945—including the declined Advisory Opinion of the Permanent Court of International Justice in the matter concerning the *Status of Eastern Carelia*²—as found in chapter one, it was in the post-Charter era that various of the forms of self-determination began to acquire legal force, and it is in this period that judicial interpretations of self-determination have become increasingly important, particularly before the International Court of Justice (ICJ). Tesón asserts that ‘[i]n none of its opinions on self-determination did the Court depart from the restrictive view that only former colonies [...] had the right to self-determination.’³ A different view will be presented here. In contrast to Tesón’s statement, it will be argued that the Court has implicitly or explicitly recognised several forms of self-determination, and has accepted a customary law status for at least two forms: colonial and political self-

² *Status of Eastern Carelia* (1923) PCIJ, Series B, No.5, 7. The Court was asked to render an Advisory Opinion on the legal obligations on Finland and Russia under the Treaty of Dorpat which, among other matters, provided for ‘the national right of self-determination’ for the territory of Eastern Carelia, which at that time was split between Russian and Finnish territory (Treaty of Dorpat, concluded 14 October 1920, in force 1 January 1921, Article 10). The Court declined to give an opinion on the dispute because Russia had not given its consent to the jurisdiction of the Court (p.28).

³ Fernando R Tesón, ‘Introduction: The Conundrum of Self-Determination’ in Fernando R Tesón (ed), *The Theory of Self-Determination* (Cambridge University Press 2016) 2, f5.

determination. Nor are such developments insignificant. As Thirlway restrainedly concludes: ‘it is universally accepted, if not self-evident, that every decision the Court hands down will have an influence (to put it no higher) on how the law in the relevant field will thereafter be understood’.⁴

This chapter begins its survey with the *Namibia* Advisory Opinion of the ICJ (1971), before considering its Advisory Opinion in *Western Sahara* (1975), the judgment in *East Timor* (1995), the African Commission on Human and People’s Rights decision in *Katanga* (1995), the Canadian Supreme Court’s judgment in *Reference Re: Secession of Quebec* (1998), and the Advisory Opinion in *Wall* (2004). It concludes with an in-depth assessment of the ICJ’s *Kosovo* Advisory Opinion (2010)—its most recent foray into this territory—and a discussion of the ways in which the reasoning of the Court has been used by the parties to the conflict in Crimea. It will conclude that although international law remains deeply conflicted over the status of secessionary self-determination (the principle is widely reviled, but it cannot be said with certainty that secessionary self-determination is illegal), and remains somewhat uncertain or ambivalent about the legality of remedial self-determination, the judicial history confirms the findings of the previous chapter, that colonial self-determination is now firmly established as a legal norm, and that political self-determination is a vital and deep-seated principle of the international legal order.

⁴ Hugh Thirlway, *The International Court of Justice* (Oxford University Press 2016) 202. On this point see further Hernández, who provides a summary of academic and judicial opinion on the ability of the Court consciously to develop international law: Gleider I Hernández, *The International Court of Justice and the Judicial Function* (Oxford University Press 2014) 90 et seq.

2. Judicial Treatments of Self-Determination before *Kosovo*

2.1 Advisory Opinion on Namibia (South West Africa)

In its Advisory Opinion on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)* of 1971, the ICJ was asked by the Security Council to assess the legalities pertaining to the continued administration of the Mandate territory of Namibia by the former Mandatory power, South Africa.⁵

On the 27th October 1966 the General Assembly adopted resolution 2154(XXI), by which it terminated the Mandate for South West Africa, previously held by South Africa. Following a long-running dispute over the application by South Africa of apartheid policies to the region, the General Assembly chose instead to place the territory under the administration of an international committee of States Members of the General Assembly, whose task it would be to exercise the direct responsibility of the United Nations towards the territory and its people.⁶ Upon South Africa's failure to surrender the territory, the Security Council requested the Court render an Advisory Opinion on the legal consequences of the situation in Namibia.⁷

Among the arguments advanced by South Africa was the claim that class-C Mandates—including South West Africa—were transferred to the Mandatory powers on terms ‘not far removed from annexation’,⁸ and it was in the course of rejecting this claim that the Court made

⁵ For a summary of the events that form the background to the Court's opinion see Thomas D Musgrave, *Self-Determination and National Minorities* (Clarendon Press 1997) 80–84; John Dugard, ‘The Opinion on South-West Africa (“Namibia”): The Teleologists Triumph’ (1971) 88 South African Law Journal 460; Edward Gordon, ‘Old Orthodoxies amid New Experiences: The South West Africa (Namibia) Litigation and the Uncertain Jurisprudence of the International Court of Justice’ (1971) 1 Denver Journal of International Law and Policy 65.

⁶ UN General Assembly Resolution 2145(XXI), [4-6].

⁷ UN Security Council Resolution 284(1970).

⁸ *Legal Consequences for States of the Continued Presence of South African in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, (1971) ICJ Reports 16, [45].

its remarks on self-determination. It held that all categories of Mandates were underpinned by a consistent set of principles.⁹ Prominent among these was the idea that such territories were held on “trust” – that no matter what their current state of development, the people of the territories have ‘a potentiality for independent existence’, and that Mandatories should provide the ‘help and guidance necessary to enable them to arrive at the stage where they would be “able to stand by themselves”’.¹⁰ There was, therefore, both in general and in the particular case of the Mandate for South West Africa, a ‘rejection of the notion of annexation.’¹¹ These foundational principles of the system had not lapsed on the transposition of the Mandate system (under the League of Nations) to the United Nations.¹²

More significantly for present purposes, the Court found that ‘the subsequent development of international law in regard to non-self-governing territories, as enshrined in the Charter of the United Nations, made the principle of self-determination applicable to all of them.’¹³ It is unclear from whence the Court regarded this customary norm of self-determination for non-self-governing territories as having sprung, save from the Charter itself. It seems likely, however, that the Court was referring to the major declarations of the General Assembly—resolutions 1514(XV) and 2526(XXV)—and of the practice of that body with regard to other non-self-governing territories. Although this lack of a clear basis for its statement reduces its impact somewhat, it is nevertheless significant as a recognition of the customary status of the

⁹ *ibid* [45-46]; Arthur W Rovine, ‘The World Court Opinion on Namibia’ (1972) 11 *Columbia Journal of Transnational Law* 203, 206.

¹⁰ *Namibia* (n 8) [46]; see also Elizabeth Rodríguez-Santiago, ‘The Evolution of Self-Determination of Peoples in International Law’ in Fernando R Tesón (ed), *The Theory of Self-Determination* (Cambridge University Press 2016) 214; ‘The United Nations, Self-Determination and the Namibia Opinions’ (1972–73) 82 *Yale Law Journal* 533, 539–40.

¹¹ *Namibia* (n 8) [50]; Oliver J Lissitzyn, ‘International Law and the Advisory Opinion on Namibia’ (1972) 11 *Columbia Journal of Transnational Law* 50, 56–57.

¹² ‘The United Nations, Self-Determination and the Namibia Opinions’ (n 10) 535–36.

¹³ *ibid* [52]; see also Musgrave (n 5) 84–85; Rodríguez-Santiago (n 10) 226.

right to self-determination, which may be presumed to be the colonial form. Other forms of the self-determination norm were not considered, and it seems highly likely from the specialised context that the reference made was to colonial,¹⁴ and not to any other form of self-determination.¹⁵ That interpretation is also supported by the similar (although more explicit) reasoning of the Court in its Advisory Opinion on *Western Sahara*, given just a few years later.

2.2. *The Western Sahara Advisory Opinion*

In 1975 the ICJ handed down its Advisory Opinion on Western Sahara in response to a question posed by the General Assembly.¹⁶ The General Assembly was, at that time, considering the decolonisation of Western Sahara.¹⁷ Morocco and Mauritania each argued that Western Sahara had, prior to Spanish colonisation, been a part of their territory, and the Court was asked to assess whether, at the time of its colonisation, Western Sahara was *terra nullius* and what ties then existed between the territory and either State.¹⁸

¹⁴ Katja Samuel, 'Can Religious Norms Influence Self-Determination Struggles, and with What Implications for International Law?' in Duncan French (ed), *Statehood and Self-Determination: Reconciling Tradition and Modernity in International Law* (Cambridge University Press 2013) 304.

¹⁵ But see, *contra*, Macklem, who argues that this is better understood as an example of self-determination in the context of foreign occupation. Patrick Macklem, 'Self-Determination in Three Movements' in Fernando R Tesón (ed), *The Theory of Self-Determination* (Cambridge University Press 2016) 104. See also Lissitzyn (n 11) 58.

¹⁶ *Western Sahara*, Advisory Opinion, (1975) ICJ Reports 12. For a summary of the events leading up to and following the case see Sven Simon, 'Western Sahara' in Christian Walter and others (eds), *Self-Determination and Secession in International Law* (Oxford University Press 2014); Eibe H Riedel, 'Confrontation in Western Sahara in the Light of the Advisory Opinion of the International Court of Justice of 16 October 1975. A Critical Appraisal' (1976) 19 German Yearbook of International Law 405.

¹⁷ The question of Western Sahara remains on the General Assembly's agenda (see, e.g. GA Res 71/106 (2016)).

¹⁸ *Western Sahara* (n 16) [1].

Although the question posed to the court was primarily one of historical title,¹⁹ questions of self-determination formed the background to the request for the Advisory Opinion, and were discussed by the Court in its answer.²⁰ The Court concluded that it

[H]as not found legal ties of such a nature as might affect the application of resolution 1514 (XV) in the decolonization of Western Sahara and, in particular, of the principle of self-determination through the free and genuine expression of the will of the people of the Territory[.]²¹

Although this is a somewhat ambiguous statement, and leaves open the possibility that the Court found that the application of self-determination was merely *not impeded*—rather than *was authorised*—by law,²² the Court's discussion of self-determination clearly indicates its belief that it had acquired a legal status under customary law.²³

The Court cited its previous decision in *Namibia*, and repeated its finding that following the adoption of the UN Charter and resolution 1514(XV), there is 'little doubt that the ultimate objective of the sacred trust was the self-determination and independence of the peoples concerned', developments which it characterised as customary law.²⁴ It then cited the Declaration on Friendly Relations as further authority for the existence of a right to self-

¹⁹ For an analysis of these aspects of the Advisory Opinion see Gary Jay Levy, 'Advisory Opinion on the Western Sahara' (1975–76) 2 Brooklyn Journal of International Law 289; Mark A Smith, Jr., 'Sovereignty over Unoccupied Territories - The Western Sahara Decision' (1977) 9 Case Western Journal of International Law 135.

²⁰ *Western Sahara* (n 16) [54–55].

²¹ *ibid* [162].

²² Jorri Duursma, *Fragmentation and the International Relations of Micro-States: Self-Determination and Statehood* (Cambridge University Press 1996) 61–62.

²³ But see, *contra*, Smith, who sees none of this ambiguity. Smith argues that '[t]he right of a colonized people to self-determination could not have been expressed more clearly.' Jeffrey J Smith, 'Western Sahara: The Failure and Promise of International Law' (2011) 69 Advocate Vancouver 179, 182, [footnotes omitted]; see also Mark Weston Janis, 'The International Court of Justice: Advisory Opinion on the Western Sahara' (1976) 17 Harvard Journal of International Law 609, 618.

²⁴ *Namibia* (n 8) [53], cited in *Western Sahara* (n 16) [56]. See also Martin Dawidowicz, 'Trading Fish or Human Rights in Western Sahara? Self-Determination, Non-Recognition and the EC-Morocco Fisheries Agreement' in Duncan French (ed), *Statehood and Self-Determination: Reconciling Tradition and Modernity in International Law* (Cambridge University Press 2013) 254–55; Riedel (n 16) 423–24.

determination.²⁵ While this confirmation that self-determination had acquired a legal character is significant, it remained limited. It is clear that in the Court's view the right thus established was to colonial self-determination,²⁶ and the Court gave no opinion either on the way in which that right should be implemented,²⁷ or on whether other forms of the norm had also acquired legal status.²⁸ Although it was implied by the Court that the principle of self-determination as posited in the Charter may have broader applications, its presence in resolution 1514(XV) was in its incarnation as a tool 'for the purpose of bringing all colonial situations to a speedy end'.²⁹

2.3. *East Timor*

In the case concerning *East Timor* the idea of self-determination came again before the ICJ, and it reaffirmed its finding made in the *Namibia* and *Western Sahara* Advisory Opinions that certain of the forms of self-determination had acquired legal status. Although the Court found that it had no jurisdiction to consider the application—any finding by the Court would necessarily involve determining the rights of a third party, Indonesia, which had not consented to the Court's jurisdiction—the Court considered the status of the right to self-determination

²⁵ *Western Sahara* (n 16) [58]. Rodríguez-Santiago argues that the Court's straightforward application of the principles demonstrates that 'at that point, the right to self-determination for the peoples of the non-self-governing territories was, in the eyes of the Court, something already consolidated in the positive law': Rodríguez-Santiago (n 10) 227.

²⁶ Musgrave (n 5) 86; Lawrence L. Herman, 'Western Sahara Advisory Opinion, I.C.J. Reports 1975, P. 12 - An Analysis of the World Court Judgment in the Western Sahara Case' (1976–77) 41 *Saskatchewan Law Review* 133, 135; Laurence S. Hanauer, 'The Irrelevance of Self-Determination Law to Ethno-National Conflict: A New Look at the Western Sahara Case' (1995) 9 *Emory International Law Review* 133, 145; Riedel (n 16) 426.

²⁷ Frank Wooldridge, 'The Advisory Opinion of the International Court of Justice in the Western Sahara Case' (1979) 8 *Anglo-American Law Review* 86, 106–07.

²⁸ *ibid* 117.

²⁹ *Western Sahara* (n 16) [55].

in seeking to ascertain whether the application of the principle was sufficient to ground its jurisdiction.³⁰

Despite its brevity—the Court’s consideration of self-determination is cursory at best—the *East Timor* case may be the most significant judgment on the subject handed down by any court. Its great magnitude lies in the Court’s determination that the

[A]ssertion that the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character, is irreproachable. [...] It is one of the essential principles of contemporary international law.³¹

This is a statement of particular significance. In making it the Court confirmed that self-determination has acquired a legal status: a right cannot be of *erga omnes* character unless it first possesses the character of a legal right. It is also clear that it is a right of exceptionally high status: all members of the international community have a legal interest in its protection and fulfilment. It is not immediately clear, however, to which form or forms of the idea the Court refers. The dispute concerned the purportedly illegal annexation of East Timor by Indonesia in 1975.³² During the course of 1975 the civil and military authorities of Portugal, the then colonial power, had been withdrawing from the territory, and in December 1975 they left East Timor altogether. Overlapping slightly with the Portuguese departure, on the 7th December Indonesia intervened militarily in the territory, swiftly gaining effective control of the territory. Its occupation was widely condemned (including as an infringement on the rights of the Timorese population to self-determination) by States, the Security Council, and the

³⁰ *East Timor (Portugal v Australia)*, Judgment, (1995) ICJ Rep 90, [28-9].

³¹ *ibid* [29].

³² The Court summarised the history of the dispute in paragraphs 11-18 of the Judgment; see also Christine Chinkin, ‘East Timor: A Failure of Decolonization’ (1999) 20 *Australian Yearbook of International Law* 35; Rebecca Kavanagh, ‘Oil in Troubled Waters: The International Court of Justice and East Timor’ (1996) 18 *Sydney Law Review* 87; Daniel C Turack, ‘Towards Freedom: Human Rights and Self-Determination in East Timor’ (2000) 1 *Asia-Pacific Journal on Human Rights and Law* 55; Nehal Bhuta, ‘Great Expectations – East Timor and the Vicissitudes of Externalised Justice’ (2001) 12 *Finnish Yearbook of International Law* 165.

General Assembly.³³ During this period East Timor continued to be listed as a non-self-governing territory under Chapter XI of the Charter.³⁴

On the 15th December 1978 Australia announced that, although it objected to the invasion, it would begin negotiations with Indonesia over the delimitation of the continental shelf in the “Timor Gap” between East Timor and Australia. The negotiations yielded a treaty creating a Zone of Cooperation for the joint exploration and exploitation of the resources of the area, which was concluded in December of 1989. Portugal brought an application before the ICJ, arguing that by concluding the treaty Australia had infringed the rights of the Timorese population to self-determination, including their sovereignty over natural resources.³⁵

The Court found that it had no jurisdiction to hear the case, because to do so would involve determining the rights of a State not party to the proceedings (Indonesia).³⁶ Portugal, however, had submitted that because the rights breached by Australia—the rights of the Timorese population to self-determination—were of an *erga omnes* character, Portugal was entitled to ‘require [Australia], individually, to respect them regardless of whether or not another State had conducted itself in a similarly unlawful manner.’³⁷ This argument was ultimately unsuccessful, but it was in the course of rejecting this ground for jurisdiction that the Court

³³ See SC Res 384(1975); SC Res 389(1976); GA Res 3485(XXX); GA Res 31/53(1976); GA Res 32/34(1977); GA Res 33/39(1978); GA Res 34/40(1979); GA Res 35/27(1980); GA Res 36/50(1981); GA Res 37/30(1982).

³⁴ The situation was complicated further because Indonesia claimed to be acting in furtherance of the self-determination of the East Timorese population, and in direct accordance with their wishes. As Clark notes, this claim does not stand up to scrutiny: Roger S Clark, ‘The “Decolonization” of East Timor and the United Nations Norms on Self-Determination and Aggression’ (1980–81) 7 *Yale Journal of World Public Order* 2, 11–19.

³⁵ *East Timor* (n 30) [19].

³⁶ *ibid* [28]. For discussion of the Court’s previous case-law on indispensable third-parties and its decision in this case see Kavanagh (n 32) 90–92.

³⁷ *East Timor* (n 30) [29].

held that self-determination has an *erga omnes* character, and that ‘it is one of the essential principle of contemporary international law.’³⁸ This context implies, but does not clearly demonstrate, which forms of the idea it was to which the Court referred.³⁹

In the first place, it is clear that despite the withdrawal of the colonial power (Portugal) East Timor was still considered during this time to be a non-self-governing territory for the purposes of the decolonisation provisions of the UN Charter.⁴⁰ The interpretation of the judgment as referring primarily to colonial self-determination is supported, too, by the Court’s references to its previous statements in *Namibia* and *Western Sahara*, both of which dealt with the colonial form of the norm.⁴¹ However, the context appears to be more appropriate to political self-determination, and particularly its manifestation as a guarantor against intervention in the internal affairs of States and polities, and their right to dispose freely of their natural resources. In fact, elements of both the political and the colonial forms of the right can be seen throughout the history of the situation, and elements of both norms were referenced by many of the States participating in the debates before the General Assembly.⁴² This practice cannot be collapsed to a reference to a single form, and the statement by the

³⁸ *ibid.*

³⁹ For an excellent summary which highlights the complexities of determining which form of self-determination was at issue in the case see Maria Clara Maffei, ‘The Case of East Timor before the International Court of Justice—Some Tentative Comments’ (1993) 4 *European Journal of International Law* 223, 228–30.

⁴⁰ Musgrave (n 5) 88–90; Richard Burchill, ‘The ICJ Decision in the Case Concerning East Timor: The Illegal Use of Force Validated?’ (1997) 2 *Journal of Armed Conflict Law* 1, 5 *et seq.*

⁴¹ See also Chinkin, Simpson and Rodríguez-Santiago, all of whom characterise the question as one of colonial self-determination: Chinkin (n 32) 53; Gerry Simpson, ‘Judging the East Timor Dispute: Self-Determination at the International Court of Justice’ (1993–94) 17 *Hastings International and Comparative Law Review* 323, 335; Rodríguez-Santiago (n 10) 227; and *contra* Charney, who comments that a non-intervention lens seems more apposite: Jonathan I Charney, ‘Self-Determination: Chechnya, Kosovo, and East Timor’ (2001) 34 *Vanderbilt Journal of Transnational Law* 455, 465.

⁴² See extensive citations to this practice in the Counter Memorial of the Government of Australia, 1 June 1992, [100–140].

Court of the high status to be attributed to self-determination should therefore be understood as a reference to both the colonial and political forms.

Although its ambit appears to be limited to the established forms of the right, the judgment in *East Timor* nevertheless represents a very significant advance in understanding of the idea. It should be taken to declare that both the right of colonial peoples to determine their future political status and the right of States to freedom from external interference are principles of exceptionally high status in the international legal order.⁴³ Given their presence in the Charter and their consistent application in UN practice, it is these forms of the norm which fall within the ambit of the Court's dictum, and should be considered legal rights of *erga omnes* character.

2.4. *Katangese Peoples' Congress v Zaire*

1995 also produced a decision by the African Commission on Human and People's Rights in response to a communication brought by the Katangese Peoples' Congress against Zaire.⁴⁴ The Congress alleged a breach of Article 20 of the African Charter on Human and Peoples' Rights (ACHPR) which provides for the 'inalienable' right of peoples to self-determination, to free determination of their political status, and of their right to existence;⁴⁵ to the right of colonised peoples to independence;⁴⁶ and the right of peoples to the assistance of States Parties

⁴³ Rodríguez-Santiago rhetorically asks whether the Court's 'equation – *inalienable plus fundamental human right plus erga omnes character plus essential principle of international law* – be interpreted as an intention of the Court to rank self-determination as a *jus cogens* norm?' Rodríguez-Santiago (n 10) 228. [Emphasis in original]. She does not immediately answer the question, but argues that the Court's later *Wall* decision shows that the Court did indeed intend to imply an *ius cogens* status for self-determination (p.230).

⁴⁴ *Katangese Peoples' Congress v Zaire*, African Commission on Human and Peoples' Rights, Communication no. 75/92(1995).

⁴⁵ African (Banjul) Charter on Human and Peoples' Rights, adopted 27 June 1981, in force 21 October 1986, OAU Doc. CAB/LEG/67/3 rev. 5, Article 20(1).

⁴⁶ *ibid*, Article 20(2).

to the Charter in cases of ‘foreign domination’.⁴⁷ The Congress alleged that as a popular liberation movement, it was entitled to the support of the States Parties to the Charter, to recognition of the independence of Katanga, and to the evacuation of Zaire from the territory.⁴⁸

The judgment of the Commission was brief, but nonetheless intriguing. It began by recognising that ‘[a]ll peoples have a right to self-determination’,⁴⁹ and although it noted the existence of controversy over the definition of ‘people’, it seems to have accepted that the people of Katanga met this criterion.⁵⁰ However, the Commission found that no right to secessionary self-determination attached to Katanga. Like the Jurists in the Åland Islands dispute it prioritised the sovereignty and territorial integrity of Zaire, holding that the form of self-determination exercised by a people must be ‘fully cognisant’ of ‘sovereignty and territorial integrity’.⁵¹

However, the Commission also made a reference to remedial secession. It implied that secession may be lawful when employed as a final resort to remedy abuses:

In the absence of concrete evidence of violations of human rights to the point that the territorial integrity of Zaire should be called into question and in the absence of evidence that the people of Katanga are denied the right to participate in Government [...] the Commission holds the view that Katanga is obliged to exercise a variant of self-determination that is compatible with the sovereignty and territorial integrity of Zaire.⁵²

⁴⁷ *ibid*, Article 20(3).

⁴⁸ *Katanga* (n 44) [1].

⁴⁹ *ibid* [3].

⁵⁰ *ibid* [3-6].

⁵¹ *ibid* [4-5].

⁵² *ibid* [6].

In other words, self-determination must first be exercised internally, but where political self-determination is denied, secession may result as the application of the remedial form of self-determination.⁵³ The substance of this brief statement was to be further discussed (although not referred to) in the judgment of the Supreme Court of Canada in its *Reference Re: Secession of Quebec*.

2.5. *Reference Re Secession of Quebec*

In the case concerning the *Reference Re Secession of Quebec* the Supreme Court of Canada considered whether Quebec could legally separate itself from Canada by its unilateral act, both under the Canadian Constitution and general international law.⁵⁴ By contrast to the prior decisions of the ICJ, therefore, the case dealt not with colonial self-determination, but with the secessionary and remedial forms. Despite being the judgment of a national court, the *Quebec* decision has proven to be at least as influential in this area as many of the ICJ's offerings. It has proven to be a gravitational judgment; one that is regularly cited both by learned publicists and States as highly persuasive authority when dealing with questions of self-determination and secession.⁵⁵

⁵³ Simon draws a somewhat more minimal interpretation, that in the absence of 'a showing of denial of internal self-determination and group harms, Katanga lost its secessionist bid.' Thomas W Simon, 'Remedial Secession: What the Law Should Have Done, from Katanga to Kosovo' (2011) 40 Georgia Journal of International and Comparative Law 105, 157. In the opinion of the present author, the formula "in the absence of... then..." clearly implies the possibility of a reverse holding, and it is therefore reasonable to draw the conclusion given above: that the Commission implicitly recognised that the presence of abuses (presumably to a sufficient threshold) overcomes territorial integrity and permits remedial secession.

⁵⁴ *Reference Re Secession of Quebec* [1998] 2 SCR 217. For a summary of the background to the dispute see Pierre Bienvenu, 'Secession by Constitutional Means: Decision of the Supreme Court of Canada in the Quebec Secession Reference' (1999–2000) 21 Journal of Public Law and Policy 1.

⁵⁵ James Crawford, *The Creation of States in International Law* (2nd edn, Clarendon Press 2006) 119–20; Written Comment of Argentina, *Kosovo Advisory Opinion* [48]; Written Comment of Cyprus, *Kosovo Advisory Opinion* [154–155]; Written Comment of the Czech Republic, *Kosovo Advisory Opinion*, 7; Written Comment of Finland, *Kosovo Advisory Opinion* [8]; Written Comment of Norway, *Kosovo Advisory Opinion* [5]; Written Comment of Russia, *Kosovo Advisory Opinion* [84–86]. For an explanation of why certain judgments and other forms of interpretation of law acquire this kind of gravitational status see Andrea Bianchi, 'The Game of Interpretation in

The Court's answer to whether secessionary self-determination could apply to the situation of Quebec was emphatic:

It is clear that international law does not specifically grant component parts of sovereign states the legal right to secede unilaterally from their "parent" state.⁵⁶

Similarly, the Court stated definitively that, whatever its legal status, remedial self-determination would not apply to Quebec. That conclusion was reached despite the Court claiming that it made no determination on the status of remedial self-determination.⁵⁷ It is on this basis, as a proof that Quebec could not avail itself of remedial secession *even were it to exist as a legal right* that the Court stated that:

[T]he international law right to self-determination only generates, at best, a right to external self-determination in situations of former colonies; where a people is oppressed, as for example under a foreign military occupation; or where a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development. In all three situations, the people in question are entitled to a right to external self-determination because they have been denied their ability to exert internally their right to self-determination.⁵⁸

In so doing the Court relied on the same principles as the earlier judgment of the African Commission of Human and Peoples' Rights in *Katanga*,⁵⁹ although it neither mentioned nor

International Law: The Players, the Cards, and Why the Game is Worth the Candle' in Andrea Bianchi and others (eds), *Interpretation in International Law* (Oxford University Press 2015).

⁵⁶ *Quebec* (n 54) [111].

⁵⁷ *ibid* [135]. Nevertheless, many authors hold that the Court *did* in fact implicitly acknowledge the existence of a legal rule permitting remedial secession. Bienvu, for example, draws attention to the Court's finding that the denial of the legality of unilateral secession under international law is 'implicit in the exceptional circumstances required for secession to be permitted' (*Quebec* [112]). Bienvu appears to take this as a recognition of the legality of secession *in extremis*, stating that '[t]he Court has *no difficulty* in finding that [...] self-determination only equates with a right to external self-determination' in extreme circumstances: Bienvu (n 54) 56, [Emphasis added]; David Raič, *Statehood and the Law of Self-Determination* (Kluwer Law International 2002) 331; see also van der Vyver, who seems to feel sufficiently strongly that the Court recognised remedial secession that he considers it necessary to rebut that finding: Johan D van der Vyver, 'Self-Determination of the Peoples of Quebec under International Law' (2000) 10 Transnational Law and Policy 1, 22–26.

⁵⁸ *Quebec* (n 54) [138]; see also Kevin MacMillan, 'Secession Perspectives and the Independence of Quebec' (1999) 7 Tulane Journal of International and Comparative Law 333, 359–61; Roya M Hanna, 'Right to Self-Determination in In Re Secession of Quebec' (1999) 23 Maryland Journal of International Law and Trade 213, 234–36.

⁵⁹ *Katanga* (n 44).

cited that judgment. It is significant to note, therefore, that two Courts operating in different legal systems independently came to similar conclusions.

The parallels between the judgments are striking. The Commission gave broad statements that ‘in the absence of [...] violations of human rights *to the point that the territorial integrity*’ of the State should be compromised, and that unless ‘the people of Katanga are denied the right to participate in Government’,⁶⁰ self-determination could not be exercised through secession.⁶¹ The Canadian Supreme Court stated in greater detail that it considered the threshold for remedial secession to be very high: except in cases of colonisation, the Court held that ‘only’ oppression akin to a people being ‘under foreign military occupation’, or the denial of a ‘definable group’ to ‘access to government’ would justify remedial self-determination.⁶² In other words, under the framework mooted by the Canadian Supreme Court, remedial self-determination would only apply where there are exceptionally grave abuses against a definable population group within a State, and which amount to a manifest denial of that group’s political self-determination. Thus the Court implies an exceptionally high threshold.

While it is debateable whether the Canadian Supreme Court was correct to posit such a high threshold, it clearly stated its position that its discussion of the threshold requirement is hypothetical given that the issue did not arise in the case.⁶³ Indeed, the Court declined to make

⁶⁰ *ibid* [4]. [Emphasis added].

⁶¹ *ibid* [6].

⁶² *Quebec* (n 54) [138].

⁶³ *ibid* [135]; see also ‘Reference Re Secession of Quebec from Canada: Breaking Up is Hard to Do’ (1998) 21 *University of New South Wales Law Journal* 834, 841–43.

a determination on whether remedial self-determination exists *at all*.⁶⁴ Nevertheless, the Court's judgment is routinely cited by both commentators and States as a judicial finding that remedial secession applies only in exceptional circumstances, and there can be little doubt that it has contributed to a developing *opinio iuris* on behalf of States that remedial self-determination is a right of very limited application.⁶⁵

2.6. *The Wall Advisory Opinion*

In 2004 the ICJ replied to the request of the General Assembly, giving its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.⁶⁶ In a wide-ranging examination, the Court opined that the construction of the wall⁶⁷ contravened both international human rights law and international humanitarian law.⁶⁸ Significantly, it also held that the construction of the wall represented a breach of the Palestinian people's right to self-determination. It should be noted at the outset, however, that whether the Palestinian people's right to self-determination gave rise to a right to independence or statehood was beyond the scope of the question presented by the General Assembly and was not discussed.

⁶⁴ *Quebec* (n 54); Mégret describes the judgment as a 'passing recognition' of the idea of remedial secession in an otherwise 'lukewarm' international reception of the idea: Frédéric Mégret, 'The Right to Self-Determination: Earned, Not Inherent' in Fernando R Tesón (ed), *The Theory of Self-Determination* (Cambridge University Press 2016) 52.

⁶⁵ See, e.g. Jens David Ohlin, 'The Right to Exist and the Right to Resist' in Fernando R Tesón (ed), *The Theory of Self-Determination* (Cambridge University Press 2016) 72–73; Macklem (n 15) 113–14.

⁶⁶ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, (2004) ICJ Rep 136.

⁶⁷ The "wall" is known variously as the "separation fence", "separation wall", "security fence", "separation barrier" and "Apartheid wall". In its decision the ICJ adopted the (more neutral) terminology of "wall" employed by the General Assembly in its request for an Advisory Opinion (See *ibid* [66]). I adopt that terminology here.

⁶⁸ For an excellent summary and analysis of the many legal issues discussed by the Court see Andrea Bianchi, 'Dismantling the Wall: The ICJ's Advisory Opinion and Its Likely Impact on International Law' (2004) 47 *German Yearbook of International Law* 343.

Recalling its prior judgments on self-determination, the ICJ confirmed that self-determination had acquired the status of a legal right under international law. States are under parallel obligations under the Declaration on Friendly Relations, to ‘refrain from any forcible action which deprives peoples [...] of their right to self-determination’,⁶⁹ and the common Article 1 ICCPR/ICESCR, to ‘promote the realization of [the right to self-determination] and to respect it’.⁷⁰ The Court found that the construction of the wall violated both the negative and the positive obligations. It found, first, that the construction of the wall ‘would be tantamount to *de facto* annexation’,⁷¹ implying a breach of the negative obligation not to deprive; and that its construction violates the State’s positive obligation by ‘imped[ing] the exercise by the Palestinian people of its right to self-determination’.⁷² The negative obligation to refrain from depriving peoples of their right and the positive obligation to promote its realisation were also held to apply to other States. The Court confirmed that third States are under an *erga omnes* obligation to refrain from recognising the ‘illegal situation resulting from the construction of the wall’, and to withhold ‘aid or assistance in maintaining the situation’.⁷³ More surprisingly, the Court also held that all States are under the parallel positive obligation to promote the realisation of self-determination.⁷⁴

⁶⁹ Declaration on Friendly Relations, annexed to UNGA Res 2625(XXV), in *Wall* (n 66) [88].

⁷⁰ *Wall* (n 66) [88].

⁷¹ *ibid* [121]; Sten Verhoeven, ‘Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories’ (2004) 6 *International Law FORUM du droit international* 106, 108; Caroline E Foster, ‘Legal Consequence of the Construction of a Wall in the Occupied Palestinian Territory: The Advisory Opinion of the International Court of Justice, Human Security and Necessity’ (2005) 2 *New Zealand Yearbook of International Law* 51, 77.

⁷² *Wall* (n 66) [122]; see also ‘Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory: Advisory Opinion, 9 July 2004’ (2005) 54 *International and Comparative Law Quarterly* 1003. For an analysis of the Separate and Dissenting Opinions in the case, and in particular the question of whether every impediment to self-determination amounts to a breach of the norm see Susan Akram and Michael Lynk, ‘The Wall and the Law: A Tale of Two Judgments’ (2006) 24 *Netherlands Quarterly of Human Rights* 61, 77–78.

⁷³ *Wall* (n 66) [159].

⁷⁴ *ibid*.

Although the Court stated clearly that a right to self-determination exists under international law, and that the corresponding obligations apply both to Israel and to third States, the form of the right engaged is less clear. Although the Court referred to its case-law on colonial self-determination, it does not appear that the Court considered that Palestine had a right to self-determination as a former mandate or as a non-self-governing territory.⁷⁵ By contrast, the Court laid emphasis on Palestine's status as an occupied territory,⁷⁶ and it seems likely, therefore, that the Court relied principally on the right of the Palestinian people to political self-determination in making its decision.⁷⁷ The construction of the wall by Israel effected the *de facto* annexation of the territory, prejudicing the ability of the Palestinian peoples, as a unit, to determine the form and manner of their political integration and future governance.⁷⁸

The primary significance of the Advisory Opinion is often seen as the ICJ's confirmation that Israel's legal status in the Palestinian territories is that of an occupying Power. Nevertheless, an equally important aspect of the Opinion was its contribution to the understanding of self-determination. Israel was declared to be under an obligation to cease construction of the wall, to dismantle those sections already constructed,⁷⁹ and to return lands seized for the purpose of constructing the wall.⁸⁰ Other States, meanwhile, are under parallel obligations to refrain from recognising the situation created by the wall, to refrain from enabling its construction, and to

⁷⁵ *ibid* [88].

⁷⁶ *ibid* [78].

⁷⁷ As Orakhelashvili notes, this was an 'innovative' application of self-determination 'outside the colonial context': Alexander Orakhelashvili, 'Legal Consequence of the Construction of a Wall in the Occupied Palestinian Territory: Opinion and Reaction' (2006) 11 *Journal of Conflict and Security Law* 119, 122; see also Foster (n 71) 76.

⁷⁸ Samuel (n 14) 304; Christopher Waters, 'South Ossetia' in Christian Walter and others (eds), *Self-Determination and Secession in International Law* (Oxford University Press 2014) 184–85.

⁷⁹ *Wall* (n 66) [151].

⁸⁰ *ibid* [153].

take steps to bring the impediment to the exercise of the Palestinians' political self-determination to an end.⁸¹ Not only does the Advisory Opinion amount to a reaffirmation of the non-interference aspect of political self-determination, therefore, but it confirms that it exists as a right *erga omnes* in both its positive and negative aspects.⁸²

3. The Kosovo Advisory Opinion

In 2010, the ICJ issued its much-anticipated Advisory Opinion on the *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*.⁸³ The opinion has rightly been seen as highly significant, and a great deal of ink has been expended in analysis of its many facets.⁸⁴ Nevertheless, subsequent events in Crimea demand a

⁸¹ *ibid* [159]; see also Iain Scobbie, 'Unchart(er)ed Waters?: Consequences of the Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory for the Responsibility of the UN for Palestine' (2005) 16 *European Journal of International Law* 941, 945–48.

⁸² Rodríguez-Santiago goes further, arguing that the 'whole approach by the Court' together with the reference to a right of *erga omnes* status suggests that the Court 'was under the understanding that it was dealing with a *jus cogens* norm.' Rodríguez-Santiago (n 10) 230. By contrast the present author does not feel that the text of the Advisory Opinion, for all that it demonstrates that the Court considered the right to political self-determination to be a norm of high status, supports such a far-reaching conclusion.

⁸³ *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, (2010) ICJ Reports 403.

⁸⁴ See e.g. Nate Beal, 'Defending State Sovereignty: The I.C.J. Advisory Opinion on Kosovo and International Law' (2011–13) 21 *Transnational Law & Contemporary Problems* 549; Thomas Burri, 'The Kosovo Opinion and Secession: The Sounds of Silence and Missing Links' (2010) 11 *German Law Journal* 881; Theodore Christakis, 'The ICJ Advisory Opinion on Kosovo: Has International Law Something to Say about Secession?' (2011) 24 *Leiden Journal of International Law* 73; Elena Cirkovic, 'An Analysis of the ICJ Advisory Opinion on Kosovo's Unilateral Declaration of Independence' (2010) 11 *German Law Journal* 895; James Crawford, 'Kosovo and the Criteria for Statehood in International Law' in Marko Milanović and Michael Wood (eds), *The law and politics of the Kosovo Advisory Opinion* (Oxford University Press 2015); Hurst Hannum, 'The Advisory Opinion on Kosovo: An Opportunity Lost, or a Poisoned Chalice Refused?' (2011) 24 *Leiden Journal of International Law* 155; Peter Hilpold, 'The International Court of Justice's Advisory Opinion on Kosovo: Perspectives of a Delicate Question' (2009) 14 *Australian Review of International and European Law* 259; Robert Howse and Ruti Teitel, 'Delphic Dictum: How Has the ICJ Contributed to the Global Rule of Law by Its Ruling on Kosovo?' (2010) 11 *German Law Journal* 841; Miodrag Jovanović, 'After the ICJ's Advisory Opinion on Kosovo: The Future of Self-Determination Conflicts' [2012] *Annals of the Faculty of Law in Belgrade - International Edition* 292; Daniel H Meester, 'The International Court of Justice's Kosovo Case: Assessing the Current State of International Legal Opinion on Remedial Secession' (2010) 48 *Canadian Yearbook of International Law* 215; Marko Milanović and Michael Wood (eds), *The Law and Politics of the Kosovo Advisory Opinion* (Oxford University Press 2015); Robert Muharremi, 'A Note on the ICJ Advisory Opinion on Kosovo' (2010) 11 *German Law Journal* 867; Alexander Orakhelashvili, 'The International Court's Advisory Opinion on the UDI in Respect of Kosovo: Washing Away the "Foam on the Tide of Time"' (2011) 15 *Max Planck Yearbook of United Nations Law* 65; Alain Pellet, 'Kosovo - The Questions Not Asked: Self-Determination, Secession, and Recognition' in Marko Milanović and Michael Wood (eds), *The Law and Politics*

reassessment of the Advisory Opinion, and in particular its understanding of self-determination.

In the guise of the General Assembly's question on the legality of the unilateral declaration of independence, the Court was presented for the first time with an opportunity to rule directly on the legality of secession, and in particular to examine those forms of self-determination which can result in the separation of a territory from a State: remedial and secessionary self-determination. This the Court chose not to do. Despite a growing, if very tentative, consensus on the legality of remedial secession in the years that preceded the opinion, the Court made a choice to disregard these fledgling legal principles in favour of a reassertion of the *Lotus* dogma.⁸⁵ In so doing, the Court removed the question of secession from the ambit of law altogether, and relegated it to the sphere of power politics.

In order to interrogate these aspects of the opinion, the text of the *Kosovo* Advisory Opinion will first be examined, and it will be argued that the Court's treatment of sovereignty and self-determination—facilitated by its (mis)interpretation of the General Assembly's question—demonstrated a desire on the part of the Court to avoid substantive engagement with questions relating to secession. Strikingly, however, as will be argued further in chapter three, the

of the Kosovo Advisory Opinion (Oxford University Press 2015); Anne Peters, 'Does Kosovo Lie in the Lotus-Land of Freedom?' (2011) 24 *Leiden Journal of International Law* 95; Anne Peters, 'Has the Advisory Opinion's Finding that Kosovo's Declaration of Independence Was Not Contrary to International Law Set an Unfortunate Precedent?' in Marko Milanović and Michael Wood (eds), *The Law and Politics of the Kosovo Advisory Opinion* (Oxford University Press 2015); Milena Sterio, 'The Case of Kosovo: Self-Determination, Secession, and Statehood under International Law' (2010) 104 *American Society of International Law Proceedings* 361; Mindia Vashakmadze and Matthias Lippold, '"Nothing but a Road towards Secession"? - The International Court of Justice's Advisory Opinion on Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo' (2010) 2 *Goettingen Journal of International Law* 619; Mark Weller, 'Modesty Can Be a Virtue: Judicial Economy in the ICJ Kosovo Opinion?' (2011) 24 *Leiden Journal of International Law* 127; Marc Weller, 'The Sounds of Silence: Making Sense of the Supposed Gaps in the Kosovo Opinion' in Marko Milanović and Michael Wood (eds), *The Law and Politics of the Kosovo Advisory Opinion* (Oxford University Press 2015); Ralph Wilde, 'Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo' (2011) 105 *American Journal of International Law* 301.

⁸⁵ *The Case of the S.S. "Lotus"*, 1927 PCIJ Series A, No. 10.

conclusions of the Court may lend some support for a change in the structure of the international legal system of the kind hypothesised in this thesis.⁸⁶ Finally, the conflict in Crimea will be discussed, as a recent conflict in which self-determination principles—and *Kosovo*—were explicitly invoked.

3.1 *The Advisory Opinion*

In its *Kosovo* Advisory Opinion the ICJ was, for the first time, called upon to decide a question which placed secession and self-determination at the heart of its decision.⁸⁷ The General Assembly asked ‘[i]s the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?’⁸⁸ According to one point of view, the Advisory Opinion was the most significant statement of the law of self-determination yet achieved,⁸⁹ but from other perspectives the judgment appears to be, variously, a culpable example of judicial law-making,⁹⁰ a narrow answer to a narrow

⁸⁶ See below p.182-192.

⁸⁷ *Kosovo* (n 83). For a summary of the factual background to the opinion see James Summers, ‘Kosovo’ in Christian Walter and others (eds), *Self-Determination and Secession in International Law* (Oxford University Press 2014).

⁸⁸ *Kosovo* (n 83) [1]; GA Res. 63/3, 8 October 2008.

⁸⁹ --, ‘K. Albanians Hail ICJ Decision as Big Victory’, *b92.net* (22 July 2010) <http://www.b92.net/eng/news/politics-article.php?yyyy=2010&mm=07&dd=22&nav_id=68621> accessed 16 April 2015; --, ‘Albania Welcomes UN Court’s Backing of Kosovo Independence’, *CRIENGLISH.com* (23 July 2010) <<http://english.cri.cn/6966/2010/07/23/1461s584558.htm>> accessed 16 April 2015.

⁹⁰ Leonid Slutsky, first deputy Chairman of the Russian State Duma’s International Affairs Committee stated that the Court’s ruling ‘could be likened to Pandora’s box’. See Natalia Makarova, ‘UN Court Ruling Doesn’t Change Moscow’s Stance on Kosovo’, *RT* (5 August 2010) <<http://rt.com/politics/kosovo-independence-moscow-stance/>> accessed 16 April 2015.

question,⁹¹ poor judicial reasoning,⁹² ‘institutional cowardice’,⁹³ or something of a damp squib.⁹⁴ By contrast, it will be submitted here that the Advisory Opinion represents a strange dichotomy. In side-stepping questions of self-determination and choosing to render no opinion on significant issues, the Court failed to provide guidelines for future conduct and, crucially, created a legal regime which cannot be successfully implemented in practice. It has been suggested that these *lacunae* in the Court’s opinion were a creditable recognition that its function is not to make, but to apply, law.⁹⁵ However, while it may be true to say that no law relevant to the questions existed, the Court’s avoidance of the question of *whether or not* relevant legal rules exist amounts to a failure of the judicial function, and represents a choice not to apply relevant and applicable international law even if some should be found. Indeed, in some regards the Court’s failure to apply putative legal standards has retrospectively cast doubt on the validity of those standards. In doing so the Court has not only failed to resolve, but has increased the uncertainty in this already vague area of international law. At the same time, however, the Court has delivered an opinion which may have weighty implications for the structure of international law. It implied a changing conception of the sovereignty of the

⁹¹ See e.g. Christian Tams, ‘The Kosovo Opinion’ (*EJIL:Talk!*, 6 August 2010) <<http://www.ejiltalk.org/the-kosovo-opinion/>> accessed 16 April 2015; Chris Borgen, ‘The Kosovo Advisory Opinion, Self Determination, and Secession’ (*Opinio Juris*, 23 July 2010) <<http://opiniojuris.org/2010/07/23/the-kosovo-advisory-opinion-self-determination-and-secession/>> accessed 16 April 2015.

⁹² See e.g. Jure Vidmar, ‘The Kosovo Opinion and General International Law: How Far-Reaching and Controversial Is the ICJ’s Reasoning?’ *The Hague Justice Portal* <<http://www.haguejusticeportal.net/index.php?id=12110>> accessed 16 April 2015.

⁹³ Michael Blake, ‘Civil Disobedience, Dirty Hands, and Secession’ in Fernando R Tesón (ed), *The Theory of Self-Determination* (Cambridge University Press 2016) 167. Blake ultimately dismisses the charge of moral cowardice, concluding that ‘the modesty of this decision is worth celebrating, rather than lamenting’ (p.168).

⁹⁴ See e.g. Dov Jacobs, ‘The Kosovo Advisory Opinion: A Voyage by the ICJ into the Twilight Zone of International Law’ (*The Hague Justice Portal*, 12 October 2010) <<http://www.haguejusticeportal.net/index.php?id=12131>> accessed 16 April 2015; John Cerone, ‘The World Court’s Non-Opinion’ (*Opinio Juris*, 25 July 2010) <<http://opiniojuris.org/2010/07/25/the-world-court%E2%80%99s-non-opinion/>> accessed 16 April 2015.

⁹⁵ Tams (n 91).

State, and one which accords with the hypothesis discussed in this thesis: that the idea of political self-determination is humanising the secondary concepts of international law.

3.1.1 *A Caveat*

Before criticising the Court's decision, it is important to acknowledge that there were certain matters that the Court did not, and arguably some that it *could* not, address. It is worth noting, first, that the subject matter of the Advisory Opinion was not self-determination, but rather the legality of the declaration of independence.⁹⁶ Indeed, the Court clearly stated its view that an assessment of whether international law contained a right of self-determination (of whatever form) would be beyond the scope of the General Assembly's question.

The Court is not required by the question it has been asked to take a position on whether international law conferred a positive entitlement on Kosovo unilaterally to declare its independence or, *a fortiori*, on whether international law generally confers an entitlement on entities situated within a State unilaterally to break away from it. Indeed, it is entirely possible for a particular act – such as a unilateral declaration of independence – not to be in violation of international law without necessarily constituting the exercise of a right conferred by it. The Court has been asked for an opinion on the first point, not the second.⁹⁷

Nor, to the disappointment of some,⁹⁸ did the Court consider whether Kosovo had achieved statehood, and whether third States were obliged either to recognise Kosovo as an independent State or to refrain from doing so.⁹⁹

⁹⁶ Although see *contra* Milanović, who points out that although 'everybody concerned claimed that the question was clear, narrow, and precisely defined', it was in fact anything but. He argues that 'practically every single word in the question required interpretation, and in fact allowed for several possible interpretations.' Marko Milanović, 'Arguing the Kosovo Case' in Marko Milanović and Michael Wood (eds), *The Law and Politics of the Kosovo Advisory Opinion* (Oxford University Press 2015) 30. [Footnotes omitted].

⁹⁷ *Kosovo* (n 83) [56].

⁹⁸ See e.g. Borgen (n 91); Tams (n 91).

⁹⁹ *Kosovo* (n 83) [51]. See further Daniel Müller, 'The Question Question' in Marko Milanović and Michael Wood (eds), *The Law and Politics of the Kosovo Advisory Opinion* (Oxford University Press 2015) 120–22.

The coherence of the Court's reasoning on the first point is doubtful – after all, while the absence of a prohibition may demonstrate that the declaration of independence was lawful, it is equally possible to demonstrate its legality by showing the existence of a permissive rule. Concurrently, although the absence of a prohibition can demonstrate the legality of an act,¹⁰⁰ the reverse cannot be maintained. Were the Court to find a prohibition on secession (in the form of territorial integrity, for example), it would nevertheless be necessary to show that no permissive rule qualified that prohibition.¹⁰¹ In other words, had the Court found evidence for a prohibition its (supposedly value-neutral) methodological approach would no longer have been adequate to answer the question posed by the General Assembly.

The Court's interpretation of the question posed thus appears teleological – as if the answer informs the question. In his Declaration, Judge Simma is highly scathing about this restrictive reading:

Under these circumstances, even a clearly recognized positive entitlement to declare independence, if it existed, would not have changed the Court's answer in the slightest.¹⁰²

Hilpold, too, is critical of the Court's decision to focus purely on prohibitive rules. He comments that

Unlike the situation prevailing a century ago, international law is now far more dense and no longer regulates state behaviour primarily by prohibitive rules. State interaction is far too complex [for] such an approach to be sufficient.¹⁰³

¹⁰⁰ *Lotus* (n 85); Hernández (n 4) 263–76, esp. 264–66. Hernández discusses the significance of the *Kosovo* Opinion for the structure of international law and the continuing relevance of the *Lotus* principle. He notes that the Court's Opinion in *Kosovo* has had the effect of 'resuscitating *Lotus*', commenting that '[d]iscarding all intermediate views, the Court arguably took the view that international law was a gapless legal order, but it did so in the most straightforward manner, adhering to the binary conception of international law in the mould of the *Lotus* judgment, and not, for example, examining the possibilities of negative permissions and prohibitions and of legal neutrality' (p.265, footnotes omitted). See also Müller (n 99) 130–32.

¹⁰¹ See *contra* Rodríguez-Santiago, who argues that 'however absurd the Court's reasoning might seem, there was no contradiction in it': Rodríguez-Santiago (n 10) 232.

¹⁰² Declaration of Judge Simma, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion (2010) ICJ Reports 478, [8].

¹⁰³ Hilpold (n 84) 287; see also Orakhelashvili (n 84) 73.

In excluding international law rights from its analysis the Court did not merely give a strict answer to a narrow question; such a narrow interpretation of the question necessitated an alteration of the question, and not ‘only in a linguistic sense, but in fact deeply modifying its meaning.’¹⁰⁴ Simma concludes that the Court’s restrictive interpretation ‘significantly reduces the *advisory* quality of this Opinion.’¹⁰⁵

The Court’s decision that the question did not require an examination of the consequences of the declaration is more reasonable.¹⁰⁶ While it is arguable that a full consideration of the legal issues necessitated an examination of whether the declaration had any effect (as will be argued below, the Court’s failure to decide whether the declaration of independence was effective is one of the most damaging legacies of the opinion), the Court was probably correct in its holding that the question ‘d[id] not ask whether or not Kosovo ha[d] achieved statehood’,¹⁰⁷ but instead focused solely on the legality of the *act* of declaring independence. Although the Court’s decision to exclude these considerations is, therefore, disappointing, their inclusion would have necessitated a (further) strained reinterpretation of the General Assembly’s question. It would, therefore, not be appropriate overly to criticise the Court for this omission.

3.2 *The Court’s Decision*

Although the Court’s conclusions were narrow, they were not insignificant. As previously stated, the Court chose to construe the question as one phrased entirely in the negative. In

¹⁰⁴ Hilpold (n 84) 288–89; see also André Nollkaemper, ‘The Court and Its Multiple Constituencies: Three Perspectives on the Kosovo Advisory Opinion’ in Marko Milanović and Michael Wood (eds), *The Law and Politics of the Kosovo Advisory Opinion* (Oxford University Press 2015) 224; but see, contra, Pellet, who argues that the ‘Court strictly kept to the question asked—and rightly so’: Pellet (n 84) 269.

¹⁰⁵ Declaration of Judge Simma (n 102) [10]. [Original emphasis].

¹⁰⁶ Müller (n 99) 123; Nollkaemper (n 104) 221 et seq.

¹⁰⁷ *Kosovo* (n 83) [51].

other words, on the premise that any action not prohibited is permitted,¹⁰⁸ the Court considered that a sufficient answer could be given by asking a more limited question: does international law prohibit declarations of independence?

The Court's answer was that international law contains no 'prohibition on declarations of independence.'¹⁰⁹ Although it held that a declaration could be rendered unlawful by a connection to certain illegal acts (such as an illegal use of force),¹¹⁰ it decided that no norm of general application prohibits declarations of independence. By contrast, many States had argued that 'a prohibition of unilateral declarations of independence is implicit in the principle of territorial integrity',¹¹¹ arguing that territorial integrity is inviolable, and that the State's right to territorial integrity forbids secession. The Russian Federation, for example, argued that:

The Declaration of independence sought to establish a new State through separation of a part of the territory of the Republic of Serbia. It was therefore, *prima facie*, contrary to the requirement of preserving the territorial integrity of Serbia.

Territorial integrity is an unalienable attribute of a State's sovereignty.¹¹²

Azerbaijan, likewise, stated:

International law is unambiguous in not providing for a right of secession from independent States. Otherwise, such a fundamental norm as the territorial integrity of States would be of little value were a right to secession under international law be recognised as applying to independent States.¹¹³

¹⁰⁸ See the Declaration of Judge Simma, who described the Court's line of reasoning as 'obsolete': Declaration of Judge Simma (n 102) [3]; see further Hernández (n 4) 264–66.

¹⁰⁹ *Kosovo* (n 83) [84].

¹¹⁰ *ibid* [81].

¹¹¹ *ibid* [80].

¹¹² Written Statement of Russia, 16 April 2009, *Accordance with International Law of the Unilateral Declaration of Independence In Respect of Kosovo* [76-77]. [Footnotes omitted].

¹¹³ Written Statement of Azerbaijan, 17 April 2009, *Accordance with International Law of the Unilateral Declaration of Independence In Respect of Kosovo* [24].

Similar arguments were advanced by Argentina,¹¹⁴ China,¹¹⁵ Iran,¹¹⁶ Romania,¹¹⁷ and Spain.¹¹⁸

Despite this strongly-expressed argument, the Court referred to obligations on States to respect the territorial integrity of other States in the UN Charter and the Declaration on Friendly Relations, and a statement to the same effect in the Helsinki Final Act, and concluded that States alone are bound by the international law prohibition on any action which violates territorial integrity, holding that ‘the scope of the principle of territorial integrity is confined

¹¹⁴ ‘The aim of the principle of territorial integrity is to protect a quintessential element of the State – its territory – whereby any modification of a State’s territorial sovereignty must take place in accordance with international law, mainly through the consent of the interested State. As a corollary of the sovereign equality of State, the principle of the respect of territorial integrity is a fundamental principle of international law. The 1970 Declaration on Principles of International Law Concerning Friendly Relations lists as one of the elements of the equal sovereignty of States the principle that “[t]he territorial integrity and political independence of the State are inviolable”.’ Written Statement of Argentina, *Accordance with International Law of the Unilateral Declaration of Independence In Respect of Kosovo* [70]. [Footnotes omitted].

¹¹⁵ ‘In the exercise of the right to self-determination, the territorial integrity of a sovereign State should be respected rather than undermined. A series of important international and regional documents, while affirming the right of self-determination, all provide for respect for State sovereignty and territorial integrity. The above principle is also reflected in State practices.’ Written Statement of China, 16 April 2009, *Accordance with International Law of the Unilateral Declaration of Independence In Respect of Kosovo* 5.

¹¹⁶ ‘The Islamic Republic of Iran believes that the principle of territorial integrity prevails both between and within states. It might falsely be argued that the principle of territorial integrity applies solely *between states* in their relations, i.e. only *states* are obliged to respect territorial integrity of the other states and not to encroach on the territory of their neighbors and other states.’ Written Statement of Iran, 17 April 2009, *Accordance with International Law of the Unilateral Declaration of Independence In Respect of Kosovo* [3.1].

¹¹⁷ ‘The principles of territorial integrity and of the inviolability of frontiers have an absolute character. This means that no changes to a State’s territory or to its frontiers can occur except in those cases when the State concerned consents to that end.

‘Therefore, the territorial integrity of States can not be affected as a result of a unilateral right of secession, which is not recognized as such by international law [...] but only as a result of a mutual agreement between or among the parties involved.’ Written Statement of Romania, 14 April 2009, *Accordance with International Law of the Unilateral Declaration of Independence In Respect of Kosovo* [97-8].

¹¹⁸ ‘Taking into account the nature of the UDI and its intended effects, it seems obvious that the legal standards of reference should be found in the rules that regulate the sovereignty and territorial integrity of the State, especially in the form of the *principle of the sovereignty equality of States*, solemnly proclaimed in the Charter of the United Nations, in Resolution 2625 (XXV) of the General Assembly and reaffirmed in a large number of international instruments with a general scope, especially the Helsinki Final Act. Undoubtedly, this is a basic principle of contemporary international law, which constitutes one of the basic tenets of the existing politico-legal system and which contributes decisively to guaranteeing peace and security in international relations.’ Written Statement of Spain, 14 April 2009, *Accordance with International Law of the Unilateral Declaration of Independence In Respect of Kosovo* [13].

to the sphere of relations between States.’¹¹⁹ This finding has attracted significant criticism, including by Judge Koroma in his Dissenting Opinion,¹²⁰ and, indeed, the Court’s reasoning on this point is flawed and cursory.¹²¹ It is startling, first, that the Court considered it sufficient to refer to three documents (one of which is of uncertain legal status) in reaching the central conclusion of the Opinion. As a matter of logic, the fact that the UN Charter (a treaty between States), does not seek to impose an obligation on non-State actors is not determinative of the non-existence of such an obligation. Indeed, Jovanović cites a number of examples of other international documents which appear to recognise an obligation to respect territorial integrity opposable to non-State actors,¹²² and the opinion that territorial integrity is a right of States appears to be entirely orthodox.¹²³

In other words, the Court either identified or caused a not insignificant shift in the meaning of territorial integrity. While the paucity of reasoning makes it difficult to identify which of these most closely accords with the Court’s own interpretation of its judgment, it is submitted here that the former is the better reading. As discussed more fully in chapter three, this characterisation of territorial integrity lends support to a wider shift in the structure of

¹¹⁹ *Kosovo* (n 83) [80].

¹²⁰ Dissenting Opinion of Judge Koroma, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion (2010) ICJ Reports 467 [21-23]: ‘The truth is that international law upholds the territorial integrity of a State. One of the fundamental principles of contemporary international law is that of respect for the sovereignty and territorial integrity of States. This principle entails an obligation to respect the definition, delineation and territorial integrity of an existing State’ [21]. See also Beal (n 84); Jovanović (n 84).

¹²¹ Weller lists this as an example of one of the ‘major determinations by the Court which are stated, but not supported by a deeper analysis of their legal basis.’ Weller, ‘The Sounds of Silence: Making Sense of the Supposed Gaps in the Kosovo Opinion’ (n 84) 188.

¹²² Jovanović (n 84) 300–02.

¹²³ See e.g. Marcelo G Kohen, ‘Introduction’ in Marcelo G Kohen (ed), *Secession: International Law Perspectives* (Cambridge University Press 2006) 6; Rodríguez-Santiago (n 10) 234–35; see also support for this position in Alain Pellet, ‘The Opinions of the Badinter Arbitration Committee: A Second Breath for the Self-Determination of Peoples’ (1992) 3 *European Journal of International Law* 178, 180; but note the different view expressed in Pellet (n 84) 274–75, where he argues that the Court was correct to hold that territorial integrity applies only between States.

international law towards a human-centric model.¹²⁴ A self-determination-based conception of the sovereignty of the State conceives of sovereignty primarily as the sphere of competence of the people of a polity to determine the principles and structures by which their society is governed, and therefore gives rise to a corollary right of that polity to be free from external interference. Such a conception would appropriately consider that territorial integrity is exclusively an external phenomenon: societies are not entitled to international legal protections against their own membership.¹²⁵

Nevertheless, that the Court's conclusion was (in the view of the author) correct does not absolve it of the need to provide adequate reasoning for its finding. It is submitted here that the Court's incomplete and unsatisfying treatment of territorial integrity is the result of its overall approach to the judgment. Following its insistence that the question posed by the General Assembly required only a negative treatment, the Court could only, with any consistency, treat territorial integrity as a negative concept. This it did uncritically rather than, as would have been more appropriate, giving a reasoned appraisal of the change in the meaning of the concept. Whatever its reason, instead of considering whether territorial integrity exists as a positive *right of States* the Court construed it as a negative *obligation* on the part of other States. Given that it found no evidence of a similar, express obligation applying to non-State actors, it declared that no such norm operated to prevent the impairment of a State's territorial integrity. By contrast a more rigorous analysis of the idea would not only have resulted in a richer and more intellectually honest Opinion, but would have provided an opportunity to test the hypothesis that the structure of international law is changing and, perhaps of more immediate significance, would have retained an important principle: that international law is capable of regulating such conflicts. By contrast, as will be argued, the

¹²⁴ See below, p.185-187

¹²⁵ For a detailed account of this argument see p.172-182.

Court has effectively removed the question of secession from the ambit of law entirely, retaining only some limited regulation of the conduct of the parties in the course of secession conflicts.

3.2.1 Remedial Self-Determination after Kosovo

The Court expressly chose not to consider remedial self-determination in the course of the Advisory proceedings, holding that the question of whether international law gave Kosovo a right to separate from Serbia was beyond the scope of the question posed by the General Assembly.¹²⁶ Its passing remarks on the subject were, nonetheless, significant. As has been discussed in this and in the previous chapter, the legal status of remedial self-determination remains unclear.¹²⁷ There are, however, some indications that remedial self-determination may be in the process of emergence as a norm of customary international law, and particularly the so-called “safeguard” clause of the Declaration on Friendly Relations,¹²⁸ which appears to exclude States which deny their population’s right to internal self-determination, access to government, or full and equal participation in the State’s political life from the protection against secession.¹²⁹ While, as noted above, it is not clear that this amounts to a recognition of remedial self-determination,¹³⁰ it has been interpreted as doing so both by academics and a

¹²⁶ *Kosovo* (n 83) [82-83].

¹²⁷ See above, p.90-91.

¹²⁸ Declaration on Friendly Relations (n 69).

¹²⁹ The same logic—although without reference to the Declaration—leads Pellet to conclude that there exists a right to remedial secession as the necessary corollary of the *ius cogens* (in his view) right to political self-determination. Pellet (n 84) 272.

¹³⁰ As stated above, it may be that this statement amounts not to a recognition of a legal rule, but rather as recognition of a legal *lacuna*. In other words, that while the breakup of States which do properly protect the political self-determination of their populations is prohibited, no rule acts to prevent the breakup of States which do not do so. That would, on the reasoning of the Court in *Kosovo*, be something less than a permissive rule. See above, p.117-119.

number of States,¹³¹ and the Declaration was cited as the basis of remedial self-determination by Judges Cançado Trindade and Yusuf in their Separate Opinions.¹³²

Remedial secession has also been discussed by two significant cases in recent years: *Katangese Peoples' Congress v Zaire*, and the *Reference Re: Secession of Quebec*.¹³³ Although the Court in *Quebec* explicitly refused to rule on the legal status of remedial self-determination,¹³⁴ the Commission in *Katanga* does appear to have accepted the existence of the norm.¹³⁵

¹³¹ The proposition is supported by the written submissions of a number of States to the Court in the course of the proceedings, as well as academic commentators. See, for example, Written Statement of Estonia, 13 April 2009, *Accordance with International Law of the Unilateral Declaration of Independence In Respect of Kosovo* [2.1]; Written Statement of Finland, 16 April 2009, *Accordance with International Law of the Unilateral Declaration of Independence In Respect of Kosovo* [8]; Written Statement of Germany, 15 April 2009, *Accordance with International Law of the Unilateral Declaration of Independence In Respect of Kosovo* 32-37; Written Statement of the Netherlands, 17 April 2009, *Accordance with International Law of the Unilateral Declaration of Independence In Respect of Kosovo* [3.6-3.7]; Written Statement of Poland, 14 April 2009, *Accordance with International Law of the Unilateral Declaration of Independence In Respect of Kosovo* [6.8-6.9]; Written Comment of Switzerland, 17 July 2009, *Accordance with International Law of the Unilateral Declaration of Independence In Respect of Kosovo* [60]; Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge University Press 1995) 108-19; Duursma (n 22) 25; Milena Sterio, *The Right to Self-Determination under International Law: 'Selfistans,' secession, and the Rule of the Great Powers* (Routledge 2013) 12-13; Valerie Epps, 'Self-Determination after Kosovo and East Timor' (1999-2000) 6 *ILSA Journal of International and Comparative Law* 445; Rodríguez-Santiago (n 10) 235; Christian Tomuschat, 'Secession and Self-Determination' in Marcelo G Kohen (ed), *Secession: International Law Perspectives* (Cambridge University Press 2006) 38-42.

¹³² Separate Opinion of Judge Cançado Trindade, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion (2010) ICJ Reports 523, [175-181]; Separate Opinion of Judge Yusuf, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion (2010) ICJ Reports 618, [11-12].

¹³³ See above 105-110.

¹³⁴ See *Quebec* (n 54) [135].

¹³⁵ See *Katanga* (n 44) [6].

Despite the affirmation of the legal status of the Friendly Relations Declaration elsewhere in its Opinion,¹³⁶ the Court referred neither to the Declaration nor to the Courts in *Quebec* or *Katanga* in its consideration of remedial secession, however, merely observing that

Whether [...] the international law of self-determination confers upon part of the population of an existing State a right to separate from that State is, however, a subject on which radically differing views were expressed by those taking part in the proceedings and expressing a position on the question. Similar differences existed regarding whether international law provides for a right of “remedial secession” and, if so, in what circumstances.¹³⁷

Although the Court’s remarks were purely incidental (the Court declared that ‘it is not necessary to resolve these questions’¹³⁸), they nevertheless cast doubt on the existence of a customary law right of remedial secession. It is probable that this finding does not—formally, at least—alter the legal situation pertaining to remedial self-determination, but it nevertheless changes the structure of the argument.¹³⁹ Although it was possible, following the Declaration, to argue that a norm of remedial secession was emerging or had emerged,¹⁴⁰ that position is now harder to maintain: despite its protestations not to consider the matter the Court has effectively indicated that no uniform *opinio iuris* exists.¹⁴¹ As with the question of territorial integrity, that the Court’s conclusion may have been correct (although in the author’s opinion, that is far from clear) does not release the Court from the requirement to provide adequate

¹³⁶ The Court cited its previous judgment in the *Case Concerning Military and Paramilitary Activities in and Against Nicaragua* ((1986) ICJ Reports 14) as authority for the proposition that the Declaration is customary international law. In *Nicaragua* the ICJ declared the Declaration to be customary international law, holding that the Declaration was more than a mere ‘reiteration or elucidation’ of the Charter [188], but that ‘the adoption by States of this text afford[ed] an indication of their *opinio juris* as to customary international law on the question’ [191]. Those holdings were reconfirmed by the Court in *Kosovo*, where it declared that the Declaration ‘reflects customary international law’. *Kosovo* (n 83) [80].

¹³⁷ *Kosovo* (n 83) [82].

¹³⁸ *ibid* [83].

¹³⁹ Summers (n 87) 252–53.

¹⁴⁰ See, above (n 131–132).

¹⁴¹ Weller, ‘The Sounds of Silence: Making Sense of the Supposed Gaps in the Kosovo Opinion’ (n 84) 200–03.

reasoning for a statement which, as this does, has implications for the understanding of this area of law.

3.2.2 *Declarations of Independence after Kosovo*

Proponents of an extensive international law right to secessionary self-determination may, at first sight, have regarded the *Kosovo* Advisory Opinion as a significant victory.¹⁴² As Wilde puts it, ‘[a]ll substate groups in the world are now on notice that [...] no international law rule bars independence declarations.’¹⁴³ In truth, the Opinion is less favourable to secession than it appears, however: ‘[i]n reality [...] the principle of effectivity has been dominant.’¹⁴⁴

While the Court held that declarations of independence are not prohibited by international law,¹⁴⁵ it did not ascribe to them any legal effect.¹⁴⁶ A declaration of independence is not sufficient to realise the secession of an entity, therefore; it is also necessary for there also to be an effective displacement of statal authority.¹⁴⁷ In other words, in order to effect independence the declaration must reflect a factual situation. In the example of Kosovo, to the extent that Kosovo now exists as a *de facto* independent entity, the declaration of independence *may* have succeeded in rendering future Serbian authority over Kosovo illegitimate by replacing Serbia’s authority-right with Kosovo’s own authority-right, but that

¹⁴² See e.g. Rodríguez-Santiago, who argues that the ‘Court ended up validating not only these declarations but also the claims for unilateral separation that are always at the heart of them’: Rodríguez-Santiago (n 10) 233–34.

¹⁴³ Wilde (n 84) 304.

¹⁴⁴ Hilpold (n 84) 300; see also Orakhelashvili (n 84) 79; Wilde (n 84) 306; Vashakmadze and Lippold (n 84) 646–47.

¹⁴⁵ *Kosovo* (n 83) [84]. The Court’s reasoning has caused Muharremi to question whether the ICJ has extended the *Lotus* principle to non-State actors, see Muharremi (n 84) 876.

¹⁴⁶ Vashakmadze and Lippold (n 84) 646.

¹⁴⁷ ‘Effective’ is used in this section to refer to efficacy in establishing an area outside the control of the parent State, and not efficacy in establishing a *new* State.

transfer was only possible because, at the time of the issuance of the declaration, Kosovo was under international administration.¹⁴⁸ Serbia's *de facto* authority over Kosovo was, at that time, virtually non-existent. Although the status of Kosovo remains uncertain, it is clear that the exceptional circumstances surrounding the declaration created a situation in which it had the *potential* to be effective.

Indeed, it is difficult to envisage a situation in which a unilateral secession, either as a result of a remedial or a secessionary claim to self-determination, could be effective under such a legal framework, short of international intervention under a Security Council mandate (as in Kosovo), or where a State is undergoing collapse and is no longer able to exercise authority over its territory (as in the disintegration of Yugoslavia). In all other cases a secession movement must effectively displace the authority of the State but, as the Court has reaffirmed, it must do so without recourse to unlawful force.¹⁴⁹ No such limit is placed on the State, however, which is entitled to use force internally provided that it complies with the relevant provisions of international humanitarian law, human rights law, and peremptory norms. Vashakmadze and Lippold comment that 'the Opinion lacks practical value. Secessionist movements may interpret the Court's Advisory Opinion as favourable to their aspirations; however, the Court's Opinion does not give them a legal tool to realize those aspirations.'¹⁵⁰

What, then, is the legal status of the secessionary form of self-determination? The Court has provided no clear answer. Although it is clearly implied that no strong right of peoples to

¹⁴⁸ *Kosovo* (n 83) [57-77].

¹⁴⁹ *ibid* [81]. In the case of a non-State actor, which cannot have recourse to self-defence, unlawful force must be interpreted as any use of force which is not authorised by the Security Council, whose practice confirms that it considers non-State Actors to be subject to the prohibition on the use of force. See *ibid* [116], where that practice is cited by the Court.

¹⁵⁰ Vashakmadze and Lippold (n 84) 647.

secessionary self-determination has emerged, the Court's reasoning could support either the mere absence of a prohibition, or the existence of a weak right of the kind implied by the Jurists in the Åland Islands dispute.¹⁵¹ Nothing in the Court's judgment aids discrimination between these alternatives, and it is not clear even that the Court considered that there is a relevant distinction between them: as Judge Simma commented, the Court's espousal of the 'obsolete'¹⁵² *Lotus* reasoning collapses the categories of "tolerated" to "permissible" to "desirable" and results in a situation where 'everything which is not expressly prohibited carries with it the same colour of legality'.¹⁵³ 'Under these circumstances,' Simma comments, 'even a clearly recognized positive entitlement to declare independence, if it existed, would not have changed the Court's answer in the slightest.'¹⁵⁴ While it can be concluded, therefore, that secessionary self-determination is not prohibited by international law, the status of the concept remains unclear, and significant questions remain over whether—and, if so, in what circumstances—it can be effectively implemented outside of the context of international intervention or fatal State collapse.

3.3 Concluding Thoughts

For those who wished to see clarification of the legal status of the various forms of self-determination, the *Kosovo* Advisory Opinion is an opportunity missed. The Court's insistence on a negative characterisation of the question may have fulfilled its function, in that it has provided guidance to the General Assembly on the legal situation pertaining to Kosovo, but it has done little to clarify the state of international law on secession and self-determination more broadly, and in some respects has added to the confusion surrounding this most contested of

¹⁵¹ See above, p.61-65.

¹⁵² Declaration of Judge Simma (n 102) [3].

¹⁵³ *ibid* [8].

¹⁵⁴ *ibid*. For a further discussion of the Court's use of the *Lotus* reasoning see chapter three, p.187-192

concepts. For example, despite a tentative coalescence of opinion around the idea that a right to remedial secession had crystallised in international law, and despite the Court's protestations that it was unnecessary to consider the subject, it has cast doubt on the idea. In parallel, the Court's negative methodology prevented an analysis of whether secessionary self-determination is not illegal merely because of the absence of a prohibition, or because a weak legal right exists which would have application in some cases. Whatever the reason, the finding that secessionary self-determination is not illegal had the potential to be a startling and far-reaching conclusion, but the Court's ancillary remarks on the subject have shown it to be primarily of rhetorical importance. Far from legalising secession, the Court has created a situation in which secession can legally take place only where the State's authority has already been displaced.¹⁵⁵ As Orakhelashvili has it, it is 'understandable that international law contains no prohibition on [Unilateral Declarations of Independence], for there can be little reason for prohibiting an act that on its own can produce no legal effect.'¹⁵⁶ Of greater concern, however, as will be discussed in the next section, the Court's studied attempt to say as little as possible has had the inadvertent effect of reducing the ability of international law to regulate intra- and inter-State conflicts involving claims of secession. The Court can be forgiven—even praised—for its reluctance to engage in such intensely political and contentious questions, but the better course in such circumstances is surely to decline the reference.¹⁵⁷ Instead the Court has produced a poorly (and teleologically) reasoned, equivocal Opinion that

¹⁵⁵ Mégret comments that '[n]ormatively, this is arguably the worst possible result, an invitation to political adventurism that is not remotely constrained by normative ambition and ends up recognizing what is based on purely pragmatic grounds.' Mégret (n 64) 53.

¹⁵⁶ Orakhelashvili (n 84) 79.

¹⁵⁷ A course of action advocated by Vice-President Tomka and Judge Bennouna: Declaration of Vice-President Tomka, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion (2010) ICJ Reports 454 [2-9]; Dissenting Opinion of Judge Bennouna, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion (2010) ICJ Reports 500 [1-26].

ultimately has little ‘*advisory*’ value.¹⁵⁸ This aspect of the Opinion will now be examined in relation to a recent example; the irredentist conflict in Crimea.

3.4 Kosovo Applied: the Crimea Debate

The effects of the *Kosovo* opinion and the current state of the international law of self-determination can, perhaps, best be illustrated by their application to a concrete example. The Crimea situation, one of the most contentious recent examples of the purported application of self-determination principles, not only serves the purpose of a case study, but has generated a great deal of comment and legal argumentation on the part of States. It thus provides a vivid demonstration of the divergence of self-determination law and State rhetoric in this highly politicised arena.

The facts surrounding Crimea remain in dispute.¹⁵⁹ It is accepted by all sides, however, that Russian military forces were actively engaged in Crimea in the lead up to the 16th March 2014 referendum, the result of which Russia recognised as legitimate, but which has been condemned by others.¹⁶⁰ On 18th March 2014 Crimea became a (*de facto*, at least) part of Russian territory when Russia ratified a treaty effecting the integration of the region.¹⁶¹ The reasons for the Russian military presence and its extent and influence, however, are matters of controversy.

¹⁵⁸ Declaration of Judge Simma (n 102) [10]. [Original emphasis].

¹⁵⁹ A timeline of events can be found here: --, ‘Ukraine Crisis: Timeline’ (*BBC News*, no date) <<http://www.bbc.co.uk/news/world-middle-east-26248275>> accessed 29 April 2015.

¹⁶⁰ Security Council, Official Records, 69th Year, 7144th Meeting, 19 March 2014, S/PV.7144, 6-8 et seq.

¹⁶¹ --, ‘Putin Signs Crimea Annexation into Law’ (*Al Jazeera English*, 22 March 2014) <<http://www.aljazeera.com/news/americas/2014/03/russian-parliament-approves-crimea-annexation-201432172722744933.html>> accessed 29 April 2015.

3.4.1 Russia's Claim

The main ground advanced by Russia in support of its actions in Crimea and the Crimean referendum appears to have been remedial self-determination. Russia characterised the change of government in Ukraine as a 'coup d'état' instigated by foreign States, and stated that the fall of the legitimate government led to '[a]narchy', 'gross and mass violations of human rights', and other circumstances including 'persecution due to nationality, language and political convictions – all of this has made the existence of the Republic of Crimea within the Ukrainian state impossible.'¹⁶² These circumstances, Russia claimed, resulted in an exceptional right to separate from Ukraine:

It is clear that the achievement of the right to self-determination in the form of separation from an existing State is an extraordinary measure. However, in the case of Crimea, it obviously arose as a result of the legal vacuum created by the violent coup against the legitimate Government carried out by the nationalist radicals in Kyiv, as well as by their direct threats to impose their order throughout the territory of Ukraine.¹⁶³

Notwithstanding that other States denied that any abuses had occurred against the Crimean population,¹⁶⁴ it is unlikely that the situation described would be sufficient to ground a right of the Crimean people to self-determination.

As discussed above, it is unclear whether international law now recognises a right to remedial self-determination. Although the right appears to have a textual basis in the Declaration on Friendly Relations and appeared, prior to 2010, to be gaining a significant degree of international acceptance,¹⁶⁵ the *Kosovo* Opinion both suggested that the requisite *opinio iuris* was not present, and implied in its approach that the existence of a right to remedial self-

¹⁶² Sergey Lavrov, Russian Foreign Minister, Address to State Duma of Russia, 20th March 2014.

¹⁶³ Mr Churkin, Permanent Representative of the Russian Federation to the UN Security Council, Security Council, Official Records, 69th Year, 7134th Meeting, 13 March 2014, S/PV.7134, 15.

¹⁶⁴ Security Council, Official Records, 69th Year, 7138th Meeting, Un Doc. S/PV.7138, 15 March 2014, at 5 *et seq.*

¹⁶⁵ See above, n 131-132.

determination would, in any event, have been immaterial to a determination of the question.¹⁶⁶

It is doubtful, therefore, whether remedial secession would have been capable of grounding a Crimean secession.

Nevertheless, it is instructive to consider whether Crimea would qualify for remedial secession, should such a norm have crystallised. Following the Declaration on Friendly Relations, a State conducting itself in accordance with the right of its inhabitants to political self-determination is entitled to the protection of its territorial integrity. In extension, a State which denies a portion of its population political self-determination is not entitled to such protection, and it is therefore necessary to assess whether the situation in Ukraine infringed the rights of the people of Crimea to this form of self-determination. The Court in *Quebec* characterised this as a strenuous test. It held that nothing short of ‘oppression’ equivalent to foreign military occupation and denial of ‘meaningful access to government’ would be sufficient to show that political self-determination had been denied.¹⁶⁷ The ACoHPR held that the test would be met by ‘violations of human rights’ or denial ‘of the right to participate in Government’, although it, too, implied that there would be a threshold to be cleared, saying that it would be necessary to show that abuses occurred ‘to the point that the territorial integrity of [the State] should be called into question’.¹⁶⁸

It seems unlikely that the situation in Crimea met this high threshold. Although there is little doubt that the abuses described by Russia would, if true, have amounted to an imposition on the rights of the people of Crimea to self-determination, both courts cast secession as a final resort. Although it is likely that certain abuses (genocide is, perhaps, the example *par*

¹⁶⁶ *Kosovo* (n 83) [56, 82-83].

¹⁶⁷ *Quebec* (n 54) [138].

¹⁶⁸ *Katanga* (n 44) [6].

excellence) are a sufficiently serious violation of the self-determination and human rights of a people to ground an instant right to remedial self-determination, it is unlikely that the abuses alleged by Russia fall within this category. These abuses probably did not ground a right to remedial self-determination partially because they had not yet actualised—fear of abuses is not sufficient; anticipatory remedial self-determination is a contradiction in terms—and because the Crimean population had not exhausted available avenues of recourse, such as the 2015 Ukrainian elections, which may have served to normalise the situation.

I would suggest, however, that in principle (and pending, in particular, issues of proof) the abuses described by Russia could have been sufficient to ground a right to remedial secession for the people of Crimea if not resolved through an internal process. The denial of political self-determination is a factual estate, and remedial secession is therefore contingent on the practical effect of its denial. The question in any given situation is not whether the State's actions are reprehensible, but whether they have the effect of denying to a section of the population the right to politically self-determine. The abuses described by Russia certainly appear to have had the potential to produce such effects, but it is not possible to say whether that they would, in practice, have done so.

3.4.2 *Crimea's Claim*

By contrast, Crimea appears to have claimed for itself a right to secessionary self-determination. In its declaration of independence of 11th March 2014, the Crimean parliament stated that the *Kosovo* Advisory Opinion provides authority for their secession, as a unilateral declaration of independence does not violate any international norms.¹⁶⁹ While the ICJ made

¹⁶⁹ --, 'Crimean Parliament Adopted a Declaration of Independence of the ARC and Sevastopol' (11 March 2014) <http://www.rada.crimea.ua/news/11_03_2014_1> accessed 29 April 2015; see also Peters, 'Has the Advisory Opinion's Finding that Kosovo's Declaration of Independence was not Contrary to International Law Set an Unfortunate Precedent?' (n 84) 291.

this finding, it did not, thereby, authorise secession.¹⁷⁰ On the contrary, the ICJ held that declarations of independence, in and of themselves, have no legal effect – a declaration of independence is only effective where the declaration is describing a *fait accompli*. It is likely that Russian military action in Crimea produced exactly such a *fait accompli*, but it is highly likely, too, that the Russian incursion would have rendered the declaration of independence unlawful, if it occurred prior to the *de facto* loss of Ukrainian control over Crimea. The ICJ held that a declaration of independence connected to an unlawful use of force would be illegal,¹⁷¹ and two questions are therefore posed: first, did Russia's intervention occur before the *de facto* separation of Crimea occurred and, secondly, if the intervention took place prior to that separation, whether Russia's use of force was justified by any other rule of international law. The latter question is, perhaps, the more straightforward: Russia claimed that it intervened in self-defence and with the consent of the (deposed) legitimate government of Ukraine, but it is clear that a number of States Members of the Security Council regarded Russia's actions as illegal,¹⁷² as do most commentators.¹⁷³ The question of chronology is more difficult to address, for several reasons. It is, first, extremely difficult to pinpoint the moment at which Crimea ceased to be under the effective control of Ukraine. Secondly, there is significant uncertainty surrounding the point at which Russian forces engaged. It is widely believed that Russian troops were covertly acting in Crimea long before Russia engaged

¹⁷⁰ *Kosovo* (n 83) [81].

¹⁷¹ *ibid.*

¹⁷² See, for example, Security Council, Official Records, 69th Year, 7124th Meeting, Un Doc. S/PV.7124, 1 March 2014; Security Council, Official Records, 69th Year, 7125th Meeting, Un Doc. S/PV.7125, 3 March 2014; Security Council, Official Records, 69th Year, 7134th Meeting, Un Doc. S/PV.7134, 13 March 2014; Security Council, Official Records, 69th Year, 7138th Meeting, Un Doc. S/PV.7138, 15 March 2014; Security Council, Official Records, 69th Year, 7144th Meeting, Un Doc. S/PV.7144, 19 March 2014.

¹⁷³ See e.g. Daniel Wisheart, 'The Crisis in Ukraine and the Prohibition of the Use of Force: A Legal Basis for Russia's Intervention?' (*EJIL:Talk!*, 4 March 2014) <<http://www.ejiltalk.org/the-crisis-in-ukraine-and-the-prohibition-of-the-use-of-force-a-legal-basis-for-russias-intervention/>> accessed 29 April 2015; Zachary Vermeer, 'Intervention with the Consent of a Deposed (but Legitimate) Government? Playing the Sierra Leone Card' (*EJIL:Talk!*, 6 March 2014) <<http://www.ejiltalk.org/intervention-with-the-consent-of-a-deposed-but-legitimate-government-playing-the-sierra-leone-card/>> accessed 29 April 2015; Nico Krisch, 'Crimea and the Limits of International Law' (*EJIL:Talk!*, 10 March 2014) <<http://www.ejiltalk.org/crimea-and-the-limits-of-international-law/>> accessed 29 April 2015.

openly, and it is conceivable that the actions of certain of the Crimean militia groups may have been attributable to Russia, if the threshold of effective control was met.¹⁷⁴ Although various indications suggest one or other answer, these are complex factual questions, and ones to which may never be fully answered. While distinctly plausible, even likely, therefore, that the Russian use of force would have deprived the declaration of independence of its legality, it is far from straightforward satisfactorily to prove that contention.

A number of States argued, in addition, that the secession of Crimea was illegal because it was contrary to Ukrainian constitutional law. The objection runs, first, that Ukrainian constitutional law requires an all-Ukraine referendum to authorise an alteration of its territory, and secondly, that Crimea was not competent to call such a referendum.¹⁷⁵ Such an argument can have no consequences for the legality of Crimea's secession, however. The ICJ in *Kosovo* stated clearly that the legality of a declaration of independence under international law does not require an investigation of its legality under domestic law. In answering the question posed by the General Assembly, the Court stated that there was no 'need to enquire into any system of domestic law.'¹⁷⁶ The issuing of a declaration of independence is an act carried out by a sub-State actor on the international plane. It is an *extra-constitutional* act, and its legality

¹⁷⁴ See, e.g., --, 'Ukraine crisis' (n 159); --, 'Ukraine: Russia behind Airport Takeovers' (28 February 2014) <<http://www.aljazeera.com/news/europe/2014/02/armed-men-seize-crimea-airport-ukraine-201422844451836650.html>> accessed 1 July 2016; Oleksandr Iakymenko, 'Russian Ruse, Ukrainian Crisis' (12 March 2014) <<http://www.aljazeera.com/indepth/opinion/2014/03/russian-ruse-ukrainian-crisis-20143127276504571.html>> accessed 1 July 2016; --, 'Russian Lawmaker Suggests Moscow Has Sent Troops to Crimea' (12 March 2014) <<http://www.reuters.com/article/us-ukraine-crisis-russia-troops-idUSBREA2B22V20140312>> accessed 1 July 2016; --, 'Captured Russian Troops "in Ukraine by Accident"' (26 August 2014) <<http://www.bbc.co.uk/news/world-europe-28934213>> accessed 1 July 2016; --, 'Ukraine Crisis: Russian Troops Crossed Border, Nato Says' (12 November 2014) <<http://www.bbc.co.uk/news/world-europe-30025138>> accessed 1 July 2016.

¹⁷⁵ Security Council, Official Records, 69th Year, 7134th Meeting, Un Doc. S/PV.7134, 13 March 2014, Statement of Luxembourg (p.4); Statement of United States of America (p.6); Statement of United Kingdom (p.7); Statement of Australia (p.13).

¹⁷⁶ *Kosovo* (n 83) [26]. For discussion of this aspect of the Advisory Opinion see Alexandros XM Ntovas, 'The Paradox of Kosovo's Parallel Legal Orders in the Reasoning of the Court's Advisory Opinion' in Duncan French (ed), *Statehood and Self-Determination: Reconciling Tradition and Modernity in International Law* (Cambridge University Press 2013).

under domestic or constitutional law is, therefore, irrelevant to the question of its international legality.

Although certain of the arguments advanced by both sides in relation to the Crimean secession were clearly specious, it is nevertheless challenging to determine its legality under international law. Although there is, following *Kosovo*, no prohibition on a declaration of independence, such declarations lack legal effect. Simultaneously, the Russian use of force in Crimea may, subject to questions of chronology and extenuating circumstances, have deprived the declaration of legality. Although Russia claimed that its actions were justified in pursuance of the Crimean people's right to remedial self-determination, it is far from clear that remedial self-determination exists as a norm of international law, and there remain significant questions as to whether any abuses eventuated and, if so, whether they met the threshold of the *in extremis* form. Three things only are clear following *Kosovo*: that the people of Crimea had no right to separate themselves from Ukraine, that Ukraine had no right to prevent them from doing so, and that the Crimean declaration of independence was, legally speaking, an irrelevance. International law, simply put, does not regulate the situation, but merely places limited restraints on the conduct of the parties. Such a conclusion has worrying implications for future international stability: while it is not clear that the absence of legal regulation in this area emboldened Russian action in Crimea, it must be regarded as a distinct possibility. As Peters argues:

[I]t is exactly the sparseness of the Opinion (and in particular the failure of the Court to pronounce itself on the underlying issue of secession instead of concentrating on the act of declaring independence) which allowed Crimea and Russia in 2014 to rely on the ICJ Opinion in order to justify the Crimean claim for self-determination and secession.¹⁷⁷

¹⁷⁷ Peters, 'Has the Advisory Opinion's Finding that Kosovo's Declaration of Independence was not Contrary to International Law Set an Unfortunate Precedent?' (n 84) 299. To paraphrase Bianchi, this could be characterised as a somewhat pyrrhic victory for the Court in the "interpretation game": Bianchi (n 55).

While legal rules can be powerful tools for those who seek to wield them,¹⁷⁸ it is arguably the absence of legal rules (and the liberation of political and power-based approaches that come with that) that should be of greater concern.

4. Conclusion

The history of the self-determination genus is not the history of an idea, but the history of four, connected ideas. Different forms of the concept have come to prominence at different times, and although the favourable treatment of one or other of the forms may have contributed to a sense that the others, too, were legitimate, in general State practice appears to support a separation of the species. This is perhaps particularly true of the few cases in which self-determination principles have been discussed by international or national Courts, where the political and colonial forms of self-determination have been found to be legal norms of high status, but which have in general treated remedial and secessionary self-determination with greater circumspection.

A historical analysis of self-determination reveals a great deal about the concept – not least that there are both subtle and substantial differences in the principles and practices surrounding its four distinct forms. A sophisticated understanding of the conceptual and legal foundations of the various forms is lacking in the debates surrounding the application of these principles in contemporary international law, primarily manifested in the conflation of self-determination's various forms. An understanding of self-determination as a composite of four ideas would also aid clarity in the judgments of national and international Courts, and would do a great deal to rid self-determination of its “Jekyll and Hyde” character, at once enhancing

¹⁷⁸ See, for example, Judge Koroma's warning that the Advisory Opinion ‘will serve as a guide and an instruction manual for secessionist groups the world over’, and Judge Skotnikov's warning that the opinion will have an ‘inflammatory’ effect: Dissenting Opinion of Judge Koroma (n 120) [4]; Dissenting Opinion of Judge Skotnikov, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion (2010) ICJ Reports 515 [17].

the legitimacy and the emancipatory potential of its established political and colonial forms, and clarifying the grounds of debate surrounding its ill-favoured aspects by more clearly delineating the remedial and secessionary forms. Although an analysis of the position of the various self-determination norms in the judgments of courts reveals the uncertainty surrounding remedial self-determination and the suspicion with which the secessionary form is treated, it is the exceptionally high status accorded to colonial and, in particular, to political self-determination that is most striking. Like the documentary history of the United Nations, the judicial treatment of the political form confirms it to be a central pillar of the modern international system. In its Opinion in *Wall*, for example, the ICJ held political self-determination to be a norm of *erga omnes* character in its manifestation both as a negative prohibition and as a positive obligation on States. The hypothesis in this thesis, however, makes an additional and a deeper claim. It is argued that self-determination has been recursively instituted as a *structural principle* of the international legal system, and that it is one of the drivers of the ongoing humanisation of international law. The following chapters consider five of the central concepts of international law—sovereignty, obligation, statehood, personality, and relative normativity—and will argue that evidence of the central position of self-determination can be seen in the theories and working of these *structural properties* of the system.

Part Two

In part one, it was concluded that political self-determination now occupies a high and central position within the international legal system. That conclusion supports, but does not in and of itself prove the hypothesis discussed here, that self-determination is now a structural principle of international law. In order to advance the enquiry into that question further, part two will consider five key concepts of international law in order to discern whether self-determination may be said to be theoretically implicated in their operation, or to be affecting and guiding their development. These concepts are sovereignty, obligation, statehood, personality, and peremptory normativity, identified above as *structural properties* of the international legal system as we know it today. It will be argued that each finds its roots in self-determination.

Chapter three considers sovereignty and obligation, chapter four will examine statehood and personality, and chapter five discusses norms *ius cogens*. The examinations of these closely connected concepts will show that self-determination sits at the root of a mutually supportive and constitutive web of secondary concepts that give structure to the international legal system. It will therefore be concluded that there are strong indications that self-determination is now, as the hypothesis posits, a structural principle of the international legal system and that it is contributing to the process of the humanisation of international law

Three

Sovereignty, Obligation, and Self-Determination

*What Better Work For One Who Loves Freedom Than The
Job Of Watchman. Law Is The Servant Of Freedom.
Freedom Without Limits Is Just A Word.¹*

1. Introduction

This chapter will explore the potential of a theory of international law which takes self-determination to be a *structural principle* of the international legal system to contribute to understanding of the concepts of sovereignty and obligation. These concepts were identified above as among the most fundamental building blocks of the international legal system but, as will be shown below, they have often been taken to conflict. It will be argued here that these concepts do not exist in tension but rather in parallel, both finding their roots in the principle of self-determination. The first part of this chapter will introduce the *sovereignty problem*, so-called, and will briefly examine the history and development of sovereignty and obligation in order to show that it is not inherent in international law, but rather was a creation of the positivism of the long 19th century. Section 3 will then assess the sovereignty problem from a theoretical point of view, and will show that the sovereignty/obligation conflict continues to cast doubt on international legality. Finally, section four will argue that the ongoing humanisation of international law and, in particular, an understanding of these

¹ Terry Pratchett, *Feet Of Clay* (Corgi Books 1997) 404.

concepts premised on self-determination has the potential to reconcile sovereignty and obligation, and thus to place the concept of international law on firmer foundations.

2. The History of Sovereignty and Obligation

The spectre of John Austin has haunted international law down the years. The law of nations, he said, was law only improperly-so-called, made up of nothing more than the ‘opinions current amongst nations’.² His denial of its legal character stemmed from his reliance on the idea of sovereignty. ‘Laws’, he said, ‘are a species of *commands*’³ made by ‘a given sovereign to a person or persons in a state of subjection to its author’,⁴ and it follows from this that, in the absence of a relationship of subjugation, law (properly-so-called) is impossible.⁵

Although Austin’s voice is no longer dominant in the theory of international law, the system is still dogged by a certain normative insecurity that has its roots in what may be termed the problem of sovereignty.⁶ Sovereignty is absolutist: the State is the highest authority, and nothing sits above it. It is the sole author of its own legality, and it bound only by those rules to which it consents. But such an absolutist doctrine of sovereignty conflicts directly with the principle of obligation: that States are bound by a corpus of rules which, taken together, may be called international law.

² John Austin, *Lectures on Jurisprudence: Or the Philosophy of Positive Law*, Vol. I (5th edn., John Murray 1885) 183.

³ John Austin, *The Province of Jurisprudence Determined* (John Murray 1832) 117.

⁴ *ibid* 171.

⁵ Austin (n 2) 182.

⁶ Ole Spiermann, *International Legal Argument in the Permanent Court of International Justice: The Rise of the International Judiciary* (Cambridge University Press 2005) 73.

The principle of obligation invites us to look behind the law. What is it, ultimately, that means that a rule accepted by a State is binding upon it? The theory of sovereignty as it is set out above, with its denial of any power beyond or acting upon the State, finds the basis in consent. When a State consents to an obligation, the argument goes, it limits its own sphere of action, binding itself to the obligation in question.⁷ But as Brierly has argued, a ‘self-imposed limitation is no true limitation at all, but a contradiction in terms’.⁸ Friedmann, too, objects. ‘The obvious weakness’, he argues, ‘is that what states can consent to they can also revoke. The self-limitation of states can derive normative character only from an existing rule that a state is bound to keep its promises’,⁹ and for that reason, Hegel argues, international “law” is a political rather than a truly legal enterprise:

The basic principle of the law of nations – as the real and general law which ought to apply between States, as distinguished from the specific content of particular treaties – is that treaties, on which the obligations of States towards one another are based, ought to be kept. Because, however, the relationship between States has their sovereignty as its basic principle, they are to this extent in a State of Nature the one against the other, and the law of nations does not in general have a constitutional force over them, but their laws have their reality in their particular wills. Hence, this general determination persists as an “ought”, and the reality of the situation becomes one where treaty-obligations are altered in accordance with relations, and revoked for the same reason.¹⁰

Hegel’s account, however, is only one understanding of the concepts of sovereignty and of obligation. Like international law itself, these have not been static concepts but rather have

⁷ This line of argument found its fullest expression in the *Selbstverpflichtung* theory of Jellinek: Georg Jellinek, *Allgemeine Staatslehre* (J Springer 1922); Martti Koskenniemi, ‘A History of International Law Histories’ in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of the History of International Law* (Oxford University Press 2012) 958; see also Wolfgang Friedmann, *The Changing Structure of International Law* (Steven & Sons 1964) 85.

⁸ James Leslie Brierly, ‘The Basis of Obligation in International Law’ in Hersch Lauterpacht and Humphrey Waldock (eds), *The Basis of Obligation in International Law and Other Papers by the Late James Leslie Brierly* (Clarendon Press 1958) 14.

⁹ Friedmann (n 7) 85.

¹⁰ Georg Wilhelm Friedrich Hegel, *Grundlinien Der Philosophie Des Rechts* (Felix Meiner 1911) 268. [My translation].

altered over time, both in response to and precipitating foundational changes in international law.¹¹

2.1 Sovereignty through History: Approach and Purpose

As has been noted above,¹² there are a number of problems associated with the study of international legal history. The choices of the author as to periodisation, approach, sources and many other matters determine the scope of the enquiry, and condition the outcome in ways which may or may not be apparent. As Korhonen has argued, however, that the approach is subject to (perhaps incurable) imperfections should not cause it to be abandoned;¹³ rather an attempt should be made to mitigate its problems. It was argued above that a writer of history should clearly set out their approach, in order to lay bare ‘the unavoidable subjectivity’ of their decisions.¹⁴ This chapter, too, will adopt that approach.

This section will examine how sovereignty and obligation were viewed both in themselves and in their interplay at different points throughout history. It will use the writings of the great publicists to identify conceptions of the concepts that were highly influential in their time. In so doing there is, of course, the risk that such a history will become, to use Koskenniemi’s phrase, ‘only a sketch, if not a caricature’.¹⁵ Of necessity, a great deal is omitted from this brief account, and it is inevitable that the choice of what is and what is not included will impact

¹¹ As Prokhovnik notes, ‘[t]he idea that the meaning of sovereignty is fixed can be very effectively challenged by demonstrating the historical malleability of the concept over time.’ Raja Prokhovnik, *Sovereignty: History and Theory* (Imprint Academic 2008) 2.

¹² See above, p.16-20.

¹³ Outi Korhonen, ‘International Lawyer: Towards Conceptualization of the Changing World and Practice’ (2000) 2 *European Journal of Law Reform* 545, 555.

¹⁴ Oliver Diggelmann, ‘The Periodization of the History of International Law’ in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of the History of International Law* (Oxford University Press 2012) 1001.

¹⁵ Koskenniemi (n 7) 945.

upon the conclusions that are drawn. Most notably, the colonial history of the sovereignty idea is absent, a decision taken in order to permit a focus on the ways in which the definition of sovereignty has changed over time, rather than the ways in which those various definitions have been used and by whom.¹⁶ It is for the same reason that the decision has been taken to focus on doctrine in this short history; in order to facilitate a canvass of the contemporary understandings of sovereignty and obligation at various points in time in a way that avoids, so far as is possible, distorting the past in the light of the present. In other words, the attempt will be made to engage with the historical theory of sovereignty on its own terms. The objection could be made that by focussing on the classics of international legal doctrine (in itself a choice which reinforces the dominance of Western understandings of international law) there is a danger that a distorted picture will be produced, and one that makes the uncertain assumption that the treatment of sovereignty by the theorists of law reflects the actuality of the concept as it was understood by States and State agents at the relevant times. It should be recalled, however, that identification of past State practice is not to any greater extent a value neutral exercise, nor inherently more accurate or objective. As Carty notes, before relevant and irrelevant practice can be distinguished the ambit of the legal system must first be known: ‘the construction of the discipline comes first in providing the means to recognize what constitutes legally significant state practice.’¹⁷ This observation holds true even to a greater extent when dealing with the conceptual framework of international law than

¹⁶ Although this is a significant omission, it should not be understood as a denial of the importance of this question. As has been amply demonstrated by Anghie, the idea of sovereignty cannot be separated from the colonial experience, and attention to that relationship is vital to an understanding of sovereignty’s history and development: Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2004). However, while Anghie’s focus is on the instrumentalisation of the concept of sovereignty in the construction of international law (or the reason *why* certain concepts of sovereignty were chosen), this section’s attention is on the effects of the ideas of sovereignty that were produced for the idea of international law.

¹⁷ Anthony Carty, ‘Doctrine versus State Practice’ in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of the History of International Law* (Oxford University Press 2012) 974–75. It is important to note, however, as Bianchi does, the darker side of this construction, that ‘[a]cting as a broker between raw legal materials and its users, doctrine [can] shape[] international law to its own liking’: Andrea Bianchi, ‘Revitalizing the Subjects or Subjectivizing the Actors: Is That the Question?’ in Andrea Bianchi (ed), *Non-State Actors and International Law* (Routledge 2017) 1.

with other questions. Although the concepts of sovereignty and obligation are implicated in the acts (legal, illegal, and in between) of States, relatively rarely are the views of States on these interrelations made explicit.

This section will begin its survey with a brief outline of the role played by the concepts of sovereignty and obligation in the theories of the natural law era, before considering the development of the concepts in the long 19th century. It was in this period that natural law was replaced with a positivist framework, facilitated in the international legal sphere by Emer de Vattel who, despite being a theorist of natural law, heralded the dominance of positivism in through his “externalisation” of sovereignty. In so doing it will seek to demonstrate the discontinuities in the histories of sovereignty and obligation. Far from exhibiting a clear or continuous progression towards the 19th Century understanding, or a constant and steady meaning through time, the histories of these concepts show that the ways in which they have been understood have varied. Neither inherent nor immutable, they have been—and almost certainly remain—subject to change.

2.2 Sovereignty and Natural Law

During the 16th, 17th and 18th centuries law was generally understood as being a natural phenomenon. Preceding from a secular or (more commonly) a sacred base, the rights of sovereigns to rule within certain limits set by God or nature were proclaimed by the great writers of the day. The first theorist of sovereignty of note was Jean Bodin who, in his own estimation, was the originator of the concept.¹⁸ His was a highly political project: his *Six Books of the Commonwealth* were written as a theoretical buttress to the political shifts then taking place in a French State that was trying simultaneously to assert its independence from

¹⁸ Jean Bodin, *Six Books of the Commonwealth* (Tooley (tr), Basil Blackwell 1967) 25; see also Prokhovnik (n 11); but see, *contra*, Anghie, who begins his survey with the theory of Francisco de Vitoria, whose *De Indis* was first published in 1532: Anghie (n 16) 13 et seq.

the Pope and the Holy Roman Empire externally, and to establish its primacy over the feudal baronies internally. Sovereignty, for Bodin, was an ‘absolute and perpetual power’, but crucially one that was ‘vested in a commonwealth’, not in an individual.¹⁹ This conceptual divide allowed Bodin to maintain legal regulation of the sovereign, who did not *possess*, but merely *had the use of* the powers attached to its office.²⁰ Nevertheless, internally Bodin’s sovereign remained virtually unlimited and illimitable (save that certain of his acts would have effect only in his lifetime and would revert on his death, such as an attempt to change the line of succession).²¹ In his external dealings, however, Bodin regarded the sovereign as being bound by law properly-so-called, in the form of ‘the laws of God and nature, and even certain human laws common to all nations.’²² For Bodin sovereignty and law did not conflict. On the contrary, sovereignty was a product of divine law, and he would have regarded the suggestion that the sovereign was not bound by the law as therefore incomprehensible.

The theory of sovereignty was developed in the 17th century by Grotius and Pufendorf, regarded by many as international law’s founding fathers. For Grotius, sovereignty was primarily an internal matter referring to the ultimate power within a State.²³ He premised both the internal primacy of the sovereign and the binding nature of international law on a theory of human sociability, which he argued (following Cicero) would cause men to form societies under law, both within and between States.²⁴ Like Bodin, Grotius understood international

¹⁹ Bodin (n 18) 25.

²⁰ Prokhovnik (n 11) 49.

²¹ Bodin (n 18) 31; Julian Franklin, ‘Introduction’ in Julian Franklin (ed), *Bodin: On Sovereignty* (Cambridge University Press 1992) xxiv–xxv.

²² Bodin (n 18) 34; James Leslie Brierly, *The Law of Nations* (6th edn, Clarendon Press 1963) 10–11.

²³ Hugo Grotius, *The Rights of War and Peace* (Richard Tuck tr, Liberty Fund 2005) 259.

²⁴ *ibid* 85–94, 665–66; Patrick Riley, ‘The Legal Philosophy of Hugo Grotius’ in Damiano Canale and others (eds), *A Treatise of Legal Philosophy and General Jurisprudence, Volume 10: The Philosophers’ Philosophy of Law from the Seventeenth Century to Our Days* (Springer Netherlands 2009) 14–15.

legal limitation not as a defect in the Prince's sovereignty, but rather as its necessary corollary. For Pufendorf, by contrast, the sovereign is under only a weak obligation to uphold his promises internationally, with all other obligations being political in character. He argued that the State is a product of two covenants—the first of which establishes a society, while the second vests sovereign powers in an individual or body—which men form as a result both of their sociability, and fear of others.²⁵ Once instituted, though, Pufendorf regards the sovereign as being bound only by the law of nature (that is, the law given to men directly by God). Thus, although the sovereign is under an obligation to keep his promises, it remains an obligation to God and not to men, and no earthly remedy exists for its breach.²⁶ However, he does not hold his sovereign to be entirely unlimited in his internal or external affairs: he admits of a right of resistance where the sovereign seeks to coerce his subjects into a renunciation of their Christian faith,²⁷ and he counsels sovereigns to comply with their external obligations, if only for political reasons.²⁸

The eighteenth century produced the strongest conception of international law of the great theorists, that of Christian Wolff. Wolff held that there existed a *civitas maxima*, a State of States, which consisted of all nations under the law of nature, and whose law was a civil law, and thus binding.²⁹ A breach of the law of the *civitas maxima* could be adjudicated and appropriately sanctioned by other States.³⁰ His was a contractarian model: individuals contracted to form a State and, subsequently, to institute a sovereign (who though supreme is

²⁵ Samuel Pufendorf, *De Jure Naturae et Gentium Libri Octo* (4th edn, Printed for J Walthoe, R Wilkin and others 1729) 629–39.

²⁶ *ibid* 688.

²⁷ *ibid* 719.

²⁸ *ibid* 150–52.

²⁹ Christian Wolff, *Jus Genitum Methodo Scientifica Pertractatum* (Clarendon Press 1934) 11–13.

³⁰ *ibid* 14.

not unlimited), and the State will thereafter contract with other States to form the *civitas maxima* for the benefit of all, thus consenting to the democratic rule of all nations.³¹ It was in direct response to this theory that Emer de Vattel produced his *Droit de gens*. Although he began the work seeking only to translate Wolff for a Francophone audience, Vattel ultimately produced a significantly different and original theory, and one which has had a far greater influence on the development of the law.³² Vattel “externalised” sovereignty, equating it with independence, and thus stressing the liberty of the State and its freedom from and obligation that it had not accepted.³³ Although Vattel retains a role for a natural law-based ‘voluntary’ law of nations, he considers this primarily an unenforceable obligation of conscience.³⁴ Vattel thus minimised the application of natural law except as a moral code, and contributed to the positivisation of international law that was to follow in the long 19th century. Indeed, that Vattel’s account of international law could be recast as a largely positivist theory of law perhaps explains its enduring appeal over and above the natural law theories of Wolff and Pufendorf. Whatever the reason, endure Vattel’s influence did, and during the years to follow his externalisation of sovereignty was to be taken to its logical limit, with significant implications for the idea of obligation. Here it was that the seeds of the problem of sovereignty were planted.

³¹ *ibid* 16–17.

³² Emer de Vattel, *The Law of Nations; or Principles of the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns* (G G and J Robinson 1797) xi–xxi; Francis Ruddy, ‘Vattel’s Concept of International Law’ (1968) 4 *Texas International Law Forum* 383, 386.

³³ Vattel (n 32) 2; Stéphane Beaulac, ‘Emer de Vattel and the Externalization of Sovereignty’ (2003) 5 *Journal of the History of International Law* 237, 237.

³⁴ Vattel (n 32) lvi–lxvi; Charles Fenwick, ‘The Authority of Vattel’ (1913) 7 *The American Political Science Review* 395, 400–04.

2.3 *The ‘Long 19th Century’*

In the development of international law the long 19th Century marked a decisive turning point. This was the period in which international legal positivism came to the fore. Although much of the groundwork for these conceptual shifts was laid by Vattel’s restriction of the role played by natural law,³⁵ the abandonment of the natural basis of international law resulted in both wide-ranging and deep changes to the understanding of the system. In particular, it is here that one sees the creation of the “sovereignty problem”: a concept of sovereignty which denies true legal obligation. Although this, the so-called “classic” or “classical” doctrine of sovereignty, has come to be regarded as a necessary or immutable idea, it was an invention of the positivist era, and is as wholly contingent on the conceptual foundations of the system as was the internally-focussed sovereignty of the natural law period.

2.3.1 *The Development of International Legal Positivism*

Legal theory in the Anglophone world during this period was dominated by Jeremy Bentham and his disciple John Austin. Although the remarks of both men on international law were tangential and brief, their scholarship was central to the development of positivism, and to the growth of a view that natural law was without legitimacy and foundation. Such a view inevitably affected the development of international, as well as domestic, law.

³⁵ Although, as Schütze notes, Vattel’s focus on the voluntary law of nations and the consent of States as a source of law (and his consequent minimisation of natural law) means that ‘Vattel seems closer to Hobbes than to Wolff’ (Robert Schütze, ‘The “Unsettled” Eighteenth-Century: Kant and His Predecessors’ in Robert Schütze and Markus Gehring (eds), *Governance & Globalisation: International and European Perspectives* (Forthcoming)), Vattel notes that the ‘principle subject’ of his work will be ‘the necessary and the voluntary law of nations [which are] both established by nature, but each in a different manner’: Vattel (n 32) xvi–xvii; see also Emmanuelle Jouannet, ‘Emer de Vattel (1714-1767)’ in Bardo Fassbender and Anne Peters (eds), *The History of International Law: The Oxford Handbook* (Oxford University Press 2012) 1119, who notes that Vattel ‘remained a proponent of the school of natural law, subordinating the positivist law of nations to the natural law of nations.’ [Footnotes omitted].

Bentham's treatment of international law is, as Janis notes, fleeting, inconclusive, and easy to misread.³⁶ Bentham is often (incorrectly, in Janis's view) taken to deny the legal nature of international law. On the contrary, Bentham appears to have accepted the validity of international law,³⁷ but his scholarship nevertheless contributed to the trend away from natural law as the basis of obligation in international law. Ruddy comments that during the 18th Century natural law, a concept previously seen as being benign, 'a harmless maxim, almost a commonplace of morality,'³⁸ awoke from a Leviathan-like slumber and shook the foundations of the international legal world. As Ruddy has it, natural law became a 'mass of dynamite,'³⁹ and provided the theoretical underpinnings for two revolutions which, in the case of the American Revolution and War of Independence (1775-1783), dispossessed a King and, in the case of the French Revolution culminating in the Declaration of the Rights of Man and the Citizen (1789), deposed another, and saw his execution.⁴⁰ Natural law, which to that point had been instrumentalised by kings to justify their power over their peoples and by European empires to arrogate their subjugation of non-Christian peoples, had become in their eyes a subversive, revolutionary and unpredictable concept, and one that engendered much suspicion. Writing in response to the French Declaration Bentham expressed this scepticism, famously holding that:

That which has no existence can not be destroy'd: that which can not be destroy'd
can not require any thing to preserve it from being destroy'd. Natural rights is

³⁶ Mark Weston Janis, 'Jeremy Bentham and the Fashioning of "International Law"' (1984) 78 *American Journal of International Law* 405, 410 et seq.

³⁷ Jeremy Bentham, 'A Plan for an Universal and Perpetual Peace' in John Bowring (ed), *The Works of Jeremy Bentham*, vol 2 (William Tait 1843).

³⁸ Francis Ruddy, *International Law in the Enlightenment* (Oceana Publications, Inc 1975) 33.

³⁹ *ibid.*

⁴⁰ Anghie also points to the desire to further the colonial agenda as a factor in the decline of Natural law. Although it had, to begin with, facilitated European expansionism, he argues that natural law was constraining the colonial ambitions of the great powers to a certain extent, because of its claim to universal application. By contrast, the positivist legal model—with its sharp distinction between the "civilised" States who were bound by international law and were entitled to its protections and the "uncivilised" States which were not—gave those with colonial ambitions the freedom to "claim" territory in the non-European world on the grounds that it was *terra nullius*, and even permitted the claim of philanthropy in the form of the "civilising mission". See Anghie (n 16) 32–114, esp. 52–65.

simple nonsense: natural and imprescriptible rights, rhetorical nonsense, nonsense upon stilts.⁴¹

Bentham's highly rhetorical, but supremely memorable, denunciation of natural law and natural rights contributed to the erosion of the obligation thesis of international law and, in parallel, the strengthening the conception of State sovereignty. Where previous thinkers had grounded international law in a religious or semi-secular natural law, the writers of the long 19th Century now regarded such a theoretical foundation for international law to be suspect, and sought to formulate an international law free from such influences.

2.3.2 Sovereignty and the Basis of Obligation in International Law

During the long 19th Century a slightly-modified reading of Vattel's "external" definition of sovereignty, in which sovereignty is equated with external independence, became canonical, with few writers willing to accept limitations on the idea. This section will examine the definition of the concept and its effect on international law.

2.3.2.1 The Definition of Sovereignty

Von Martens, writing in 1795, gives, perhaps, the most nuanced definition of sovereignty to be found during this period:

For a state to be entirely free and sovereign, it must govern itself, and acknowledge no legislative superior but God. Every thing which is compatible with this independence, is also compatible with sovereignty, so that mere alliances of protection, tribute or vassalage, which a state may contract with another do not hinder it from continuing perfectly sovereign[.]⁴²

While Von Martens is even willing to accept that treaties of vassalage are compatible with a State exercising full sovereignty, later writers seem to have adopted a more absolute definition.

Wheaton speaks merely of independence in unqualified terms—'Sovereignty is the supreme

⁴¹ Jeremy Bentham, *The Collected Works of Jeremy Bentham: Rights, Representation, and Reform* (Clarendon Press 2002) 330.

⁴² Georg Friedrich Von Martens, *Summary of the Law of Nations, Founded on the Treaties and Customs of the Modern Nations of Europe* (Thomas Bradford 1795) 23–24.

power by which any State is governed. [...] External sovereignty consists in the independence of one political society, in respect of all other political societies'⁴³—and so too does Twiss.⁴⁴

It is towards the end of the period, however, that the most uncompromising definitions of sovereignty were produced. Writing in 1911, Smith defined the State as a sovereign, independent society:

The society must be a sovereign independent state, that is to say, its internal control of all persons and things within its territory must be complete and exclusive, and its external relations must be independent of the control of any other society.⁴⁵

Similarly Oppenheim, doubtless the most significant Anglophone international law scholar of this period, named sovereignty as one of his four criteria for statehood, defining sovereignty as:

[S]upreme authority, an authority which is independent of any other earthly authority. Sovereignty in the strict and narrowest sense of the term includes, therefore, independence all round, within and without the borders of the country.⁴⁶

For scholars of this period sovereignty consists of three elements: independence from the control of any one State, independence of the control of a collective of States,⁴⁷ and exclusive jurisdiction within its territory. To be a sovereign State means an absolute and exclusive authority over territory, complete liberty of action within its borders, and liberty of action constrained only by those obligations the State has accepted outwith them. It is this definition

⁴³ Henry Wheaton, *Elements of International Law* (Clarendon Press 1936) 27.

⁴⁴ Travers Twiss, *The Law of Nations Considered as Independent Political Communities: On the Rights and Duties of Nations in Time of Peace* (Fred B Rothman & Co 1985) 9.

⁴⁵ FE Smith, *International Law* (4th Edn., J M Dent & Sons Ltd 1911) 27.

⁴⁶ Lassa Francis Lawrence Oppenheim, *International Law. A Treatise - Volume 1: Peace* (2nd edn., Longmans, Green and Co 1912) 109.

⁴⁷ Hersch Lauterpacht, *International Law: Being the Collected Papers of Hersch Lauterpacht* (Cambridge University Press 1978) 7.

of sovereignty that has become canonical, being considered the orthodox, default or “classic” expression of the concept.

2.3.2.2 The Problem of Obligation

Such a definition, though, when coupled with a general rejection of natural law as a foundation of the legal system, poses a unique problem for scholars of international law: if it is not possible to ground international law in natural law, and there is no sovereign authority with a mandate or the ability to impose obligations on the various States, can it truly be said that there is an international “law”, properly-so-called, at all? This is a concern stemming from the definition of sovereignty, as Brierly identifies:

[A] modern development of the theory of sovereignty has been to give up the attempt to locate absolute power in any specific person or body within the state and to ascribe it to the state itself as a juristic person. [...] By doing so it raised a formidable difficulty for international law. For if sovereignty means absolute power, and if states are sovereign in that sense, they cannot at the same time be subject to law. [...] If the premises are correct there is no escape from the conclusion that international law is nothing but a delusion.⁴⁸

There can be little doubt that Brierly is correct in his assessment of the problem as a formidable one, and for much of the long 19th Century it received surprisingly little attention and achieved less in the way of resolution. While some writers continued to rely to some extent on natural law,⁴⁹ the basis of obligation presented a problem for those writers (the majority) in the positivist school, and in many cases the basis of obligation was not addressed.⁵⁰ Where the basis of obligation is considered, it is possible to discern two broad schools of thought. Some writers deny international law’s “legal” character, characterising the discipline as a form of

⁴⁸ Brierly (n 22) 15–16.

⁴⁹ See e.g. Robert Phillimore, *Commentaries upon International Law* (3rd edn, Adamante Media 2004); Twiss (n 44).

⁵⁰ TJ Lawrence, *The Principles of International Law* (MacMillan and Co, Limited 1895) 92 et seq.

politics,⁵¹ while others rely on a nebulous (and apparently self-constituting) principle of ‘good faith’,⁵² later to be systematised and given fuller expression by Jellinek as the theory of self-limitation.⁵³

As a basis for law, however, the idea of good faith alone is deficient.

Georg Jellinek derived the binding character of the customary rules of international law from the “self-limitation” of the states. By consenting to observe the customary rules of international conduct, the states accepted these rules of conduct without abandoning their sovereignty.⁵⁴

However, it is possible to argue, as Friedmann later would, that Jellinek’s *Selbstverpflichtung* still lacks a theoretical foundation:

The obvious weakness of this theory is that what states can consent to they can also revoke. The self-limitation of states can derive normative character only from an existing rule that a state is bound to keep its promises. In other words, this theory postulates that the *pacta sunt servanda* principle, in order to constitute an effective basis of international law, must stand above the revocable consent of states.⁵⁵

For writers in the positivist school there appears to be little in the way of answer to this criticism. They are faced with the unpalatable alternatives of accepting the (ineffective, as Smith has demonstrated⁵⁶) political force of international law as the only basis for the obligations it purports to apply, or accepting a principle of self-limitation (*Selbstverpflichtung*) which can do no more than establish a temporary and tenuous obligation. Oppenheim sought to address these concerns directly when he pointed out that: ‘It is only theorists who deny the possibility of a legal responsibility of States; the practice of the States themselves recognises

⁵¹ Twiss (n 44) 146–47.

⁵² Phillimore (n 49) 211.

⁵³ Friedmann (n 7) 85.

⁵⁴ *ibid*, [footnotes omitted]; see also Koskenniemi (n 7) 958.

⁵⁵ Friedmann (n 7) 85–86.

⁵⁶ Smith (n 45) 37.

it distinctly'.⁵⁷ This can, however, only ever be an incomplete and unsatisfying answer to a fundamental question. In the absence of a grounding principle, it can only be concluded that the classic doctrine of sovereignty renders the basis of international law suspect. This conclusion even seems to have been accepted by Oppenheim who, in a rather remarkable passage, appears to accept the incoherence of the classic doctrine of sovereignty:

[The history of the concept of sovereignty shows] that there is not, and never was, unanimity regarding this conception. [...] It is a fact that sovereignty is a term used without any well-recognised meaning except that of supreme authority. Under these circumstances those who do not want to interfere in a mere scholastic controversy must cling to the facts of life and the practical, though abnormal and illogical, condition of affairs.⁵⁸

What was, however, a 'mere scholastic controversy' became, in the early 20th Century, a matter of much more significant concern.

2.4 International Law post 1914

The long 19th Century ended in 1914 with the outbreak of the First World War.⁵⁹ Certainly these years of brutal war, unprecedented in scale, were a turning point in the development of international law. It was during the inter-war period (1918-1939) that significant movements were made towards the creation of a binding international law. Not least among these was the establishment of the League of Nations, and the first genuinely international court – the Permanent Court of International Justice (PCIJ). Although these developments ultimately failed—the League of Nations failed to prevent the outbreak of the Second World War, and was subsequently discredited and disbanded—they laid the groundwork for a second phase of

⁵⁷ Lassa Francis Lawrence Oppenheim, *International Law: A Treatise - Volume 1: Peace* (Ronald Roxburgh ed, 3rd Edn., Longmans, Green and Co 1920) 243.

⁵⁸ *ibid* 113.

⁵⁹ Eric J Hobsbawm, *The Age of Empire 1875-1914* (Pantheon Books 1987) 8–9.

international integration and law-building, in the United Nations and the International Court of Justice (ICJ).

Following WWI a new model of international law swiftly came to be accepted⁶⁰ – one that presumed international law (as a system rather than as individual rules) to be binding on all States, that premised the obligation of the State its consent, that presumed that obligations once accepted were not dependent on the will of the State, and which considered that those rules were judiciable. Despite the acceptance of this new system, however, the discourse surrounding sovereignty continued unchanged. The 19th Century conception of sovereignty (the definition given by Oppenheim⁶¹ may be treated as representative) was almost universally accepted,⁶² and the problem of international legal obligation therefore remained. During the inter-war years and the early part of the 20th Century these concerns were rarely addressed. A general presumption grew around the binding force of international law which, failing adequately to consider the underlying conflict between the concepts as they were customarily expressed, based the binding force of international law on the consent of the State and, ultimately, on sovereignty. Such was the strength of this presumption, accompanied perhaps

⁶⁰ JHW Verzijl, *International Law in Historical Perspective, Vol. I: General Subjects* (AW Sijthoff-Leyden 1968) 245.

⁶¹ See above n 46.

⁶² Peters notes that it was ‘the default position of the legal order’. Anne Peters, ‘Humanity as the A and Ω of Sovereignty’ (2009) 20 *European Journal of International Law* 513, 521. An indication that Peter’s assessment is correct can be seen in the treatment of sovereignty in some of the major textbooks of the time. Smith, for example, says that in order for an entity to be a sovereign State ‘its internal control of all persons and things within its territory must be complete and exclusive, and its external relations must be independent of the control of any other society’: Smith (n 45) 27. Similarly, Wheaton defined sovereignty as ‘the supreme power by which any State is governed. [...] External sovereignty consists in the independence of one political society, in respect of all other political societies’: Wheaton (n 43) 27. In German international law scholarship, meanwhile, Georg Jellinek developed the concept of auto-limitation (*Selbstverpflichtung*) in an attempt to reconcile this extensive definition of sovereignty with international law: Jellinek (n 7). Finally, it may be considered indicative, too, that a central part of the project of Georges Scelle, the most influential writer of the time in the Francophone tradition, was an attack on the idea of State sovereignty, which he regarded as incoherent, preferring the idea of sovereignty of law: Georges Scelle, *Précis de droit des gens: principes et systématique* (Librairie du recueil sirey (société anonyme) 1932) vol 1, 14 et seq.

by a very present (and very understandable) sense of the *need* for a binding international law, that the ability of international law to bind States was (largely) accepted without demur.

It is tempting in the modern day to dismiss the problem of sovereignty as a mere scholastic controversy. As Spiermann observes, ‘it is rather trivial, to a practitioner at least, that international law is binding’,⁶³ and a long line of PCIJ and ICJ cases marry together the (on the argument here) apparently irreconcilable conclusions that the obligations of States rest entirely on their expressed will to be bound, and that an obligation once accepted truly binds even an unwilling State. In *Gabčíkovo-Nagymaros*, for example, the ICJ held that:

The Court would set a precedent with disturbing implications for treaty relations and the integrity of the rule *pacta sunt servanda* if it were to conclude that a treaty in force between States, which the parties have implemented in considerable measure and at great cost over a period of years, might be unilaterally set aside on grounds of reciprocal non-compliance.⁶⁴

As Hudson has pointed out,⁶⁵ States accepted international law as binding during the PCIJ era, and the observation appears to hold true during the ICJ era. It is the case that States largely recognise the applicability of international law, but there can nevertheless be little doubt that the continued presence of such a fundamental conflict at the heart of international law greatly weakens the system as a whole both on a practical and a theoretical level:

Repeated invocations of the principle *pacta sunt servanda* and the notion of good faith [in the jurisprudence of the PCIJ and the ICJ] bear witness to the conception of the state as an international legal subject actually losing ground: systems secure in their normative character do not need to repeat themselves.⁶⁶

⁶³ Spiermann (n 6) 44.

⁶⁴ *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment (1997) ICJ Reports 7, [114]. See also, Separate Opinion of Judge Anzilotti, *Case Concerning the Customs Régime Between Germany and Austria* (1931) PCIJ, series A/B, no. 41, 57; *The Case of the S.S. “Lotus”* (1927) PCIJ, series A, no. 10, 19; *Colombian-Peruvian asylum case*, Judgment of November 20th, (1950) ICJ Reports 266, 277-278; *Fisheries case*, Judgment of December 18th (1951) ICJ Reports 116, 131; *North Sea Continental Shelf*, Judgment (1969) ICJ Reports 3, [74].

⁶⁵ Manley Hudson, *The Permanent Court of International Justice 1920-1942: A Treatise* (Arno Press 1972) 596.

⁶⁶ Spiermann (n 6) 73.

In the absence of a more compelling obligation thesis in international law, we are forced to content ourselves with ‘a *de facto* order’.⁶⁷ While this order has, post 1945, demonstrated a ‘remarkable stability’,⁶⁸ Friedmann nevertheless rejects it as deficient, remarking that the individual and collective wellbeing of humankind stands on no firmer foundation than a ‘hope that a general acceptance of international law [...] will by and large insure its continuity’.⁶⁹ Comforting though it would be to dismiss these doubts, the concern is warranted: the problem of sovereignty, if not satisfactorily resolved, will remain a central weakness in the international legal system, which has the very real and visible effect of diminishing the authority and effectiveness of law.⁷⁰

2.5 The History of Sovereignty: Conclusion

In the course of its long history the sovereignty idea has undergone a number of shifts and changes in meaning. From its roots in the sacred natural law theory of Bodin, it has been instrumentalised by different thinkers for different purposes, and the content given to it has accordingly changed.⁷¹ Perhaps the most significant of these shifts in meaning came in 1758 with the publication of Emer de Vattel’s *Droit de gens*. There, for the first time, sovereignty was equated with independence, a circumstance which then married with the positivist revolution of the long 19th Century to produce a doctrine of sovereignty which denied the possibility of any external limitation on the sphere of State action save that accepted by the

⁶⁷ Georg Schwarzenberger and ED Brown, *A Manual of International Law* (6th edn., Professional Books Limited 1976) 24.

⁶⁸ *ibid.*

⁶⁹ Friedmann (n 7) 88.

⁷⁰ Hubert Thierry, ‘The Thought of Georges Scelle’ (1990) 1 *European Journal of International Law* 193, 201.

⁷¹ As Werner and de Wilde point out, the word “sovereignty” has never merely pointed to a state of affairs (i.e. has never been a purely descriptive term), but always implies a justification for a factual situation (is at least in part a prescriptive term). That observation holds true whether the justification applies to an actual state of affairs, or exists as a claim which advocates for a state of affairs which “should” exist: Wouter G Werner and Jaap H de Wilde, ‘The Endurance of Sovereignty’ (2001) 7 *European Journal of International Relations* 283, 290 *et seq.*

State itself. This extreme understanding of sovereignty, rightly criticised by Brierly and Friedmann, stands in direct conflict with the idea of obligation.⁷² It was here that the “problem of sovereignty” was created, and it is this doctrine of sovereignty which has remained (by and large) dominant during the 20th Century.⁷³

That it remains a part of the legal system does not, however, imply that it necessarily or inherently is so. On the contrary, any suggestion that the 19th Century form of sovereignty is immutably tied to the international legal order is doubtful considering the very significant changes in meaning that have characterised its history. Sovereignty’s story lacks the character of a “progression towards truth”, or a legitimating historical narrative in the sense described by Forst,⁷⁴ and it seems that the concept is, therefore, at least theoretically subject to change its meaning again. Indeed, it will be argued below (section 4.3) that such a change has at least begun.

3. Theoretical Aspects of Sovereignty

The mid-late 20th and 21st centuries have seen a growing recognition on the part of international legal scholars of the paradoxical (and, one might even say, nonsensical) nature of sovereignty, and have seen a greater examination of the theory of the concept. It has been argued here that the history of the concept does not necessitate the existence of sovereignty in its modern incarnation. International legal theorists were, in this period, demonstrating that the philosophical inquiry into the concept, similarly, fails to provide modern sovereignty with

⁷² Hegel (n 10) 268.

⁷³ Anghie (n 16) 33; but see, contra, Christian Reus-Smit, ‘Human Rights and the Social Construction of Sovereignty’ (2001) 27 *Review of International Studies* 519. Reus-Smit argues that there has been a shift in the course of the 20th Century towards an equation of sovereignty and human rights (i.e., the sovereign State as the guarantor of human rights).

⁷⁴ Rainer Forst, *The Right to Justification: Elements of an Account of a Constructivist Theory of Justice* (Flynn tr, Columbia University Press 2012).

a firm basis. On the contrary: sovereignty was shown to be internally incoherent. This section considers two of the most significant modern critiques of sovereignty; the functional critique of Alf Ross, and Martti Koskenniemi's argument from incoherence.

3.1 Ross's Functional Critique

Ross criticism of the concept of sovereignty focuses on the many and varied functions it serves in international law. Through an examination of each facet of the concept Ross reveals inadequacies and inconsistencies in the doctrine, which he ultimately describes as 'mysticism'.⁷⁵ Ross concludes that the concept should be abandoned, to be replaced with three 'positive legal situations created directly by rules of law.'⁷⁶ These he refers to as self-government, capacity of action, and liberty of conduct.

Ross, first, identifies that the concept of sovereignty is traditionally seen as being the identifying feature of States in international law (and thus the determining factor in attributing international legal personality), as well as the source of certain sovereign rights.⁷⁷ Ross accepts that, when sovereignty is defined as 'self-government' it can indeed serve as a determiner of statehood.⁷⁸ He emphatically denies, however, that any "sovereign rights" can be deduced from the existence of a self-governing community.

"Sovereignty" involves no other consequences than that of the "sovereign" community being invested with the duties (and rights) called international. What these duties and rights are cannot be deduced from this definition but depend solely on the content of the norms of International Law actually in force.⁷⁹

⁷⁵ Alf Ross, *A Textbook of International Law: General Part* (Longmans, Green and Co 1947) 37–40, 44.

⁷⁶ *ibid* 44; see also Andrea Bianchi, 'Ad-Hocism and the Rule of Law' (2002) 13 *European Journal of International Law* 263, 266.

⁷⁷ Ross (n 75) 33–36.

⁷⁸ *ibid* 36.

⁷⁹ *ibid* 37.

Ross attributes the false conflation of self-government and sovereign rights to the natural law tradition which, he argues, sought to derive international law from the will of God and the divine right of kings. This Ross dismisses as ‘mystic[ism]’.⁸⁰ To this tradition Ross attributes, also, the theory of self-limitation, grounded in an artificial, “God-given” supremacy, which he regards as an impossibility: ‘[a]n obligation which is dependent on the will of the person bound is no real obligation.’⁸¹

Ross concludes that sovereignty is not capable of determining whether or not an entity is entitled to personality under international law, nor capable of grounding the central rights associated with statehood. If statehood means independence, Ross argues, it is incompatible with the existence of international law. In order to have any meaning as a concept, therefore, it must stand for a lesser proposition: that of ‘sole subjection to International Law’.⁸² Such a statement cannot provide a basis for statehood, however:

It is said first that International Law is the law binding upon states; next that states are the communities bound solely by International Law. This is evidently a vicious circle. In order to decide whether or not a community is a (sovereign) state we must first know whether or not the rules by which it is bound are international. But to know whether or not a rule is international we must first know whether or not the subjects bound by it are (sovereign) states.⁸³

Ross holds that the rights customarily derived from the existence of sovereignty may be grouped into three: self-government, capacity of action, and liberty of conduct. These he addresses in turn, and concludes in each case that it is impossible to derive the right from the existence of sovereignty. Self-government is a *substantive*, and not a *formal* question: whether an entity has or has not self-government in a practical and substantive sense is a question to be determined on the basis of the content of the norms which apply to it. Norms both

⁸⁰ *ibid* 44.

⁸¹ *ibid* 39–40.

⁸² *ibid* 41.

⁸³ *ibid*.

amounting to a restriction on self-government and not amounting to such a restriction could be contained equally well within a treaty or a constitution. Thus a “sovereign” State, an entity bound only internationally, could conclude a treaty which substantially restricted or removed its right to self-government, while a federal entity bound by a constitution could enjoy a much greater degree of autonomy. The same formula is applied to rules restricting an entity’s capacity of action, and its liberty of conduct, and Ross reaches the same conclusion: whether the rule is international or constitutional does not determine the degree to which it can restrict the entity’s capacity.⁸⁴ The connection between these rights and “sovereignty” is, therefore, incidental.

Ross concludes that the concept of sovereignty should be abandoned, to be replaced by the three rights previously identified: self-government, capacity of action, and liberty of conduct.

[T]he current concept of sovereignty consists of a goodly portion of mysticism and a consequent confusion of various real legal functions. Our task must be to overcome the idea of sovereignty as a substance or a unitary quality from which various effects follow, and instead present the separate “*effects of sovereignty*” as positive legal situations created directly by rules of law.⁸⁵

For Ross sovereignty has a rhetorical rather than substantive content.

We can, if we like, call a state sovereign when it has self-government, when it has capacity of action, or when it has the usual extensive liberty of conduct. But we can never “deduce” any of these things from a certain “quality”, sovereignty, which is anything else than the various legal rules determining the position of the state in each of the three above-mentioned relations.⁸⁶

⁸⁴ *ibid* 42–43.

⁸⁵ *ibid* 44. [Emphasis in original]. A modern day echo of this idea can perhaps be seen in Krasner’s disaggregation of the concept of sovereignty into four categories (domestic sovereignty, interdependence sovereignty, international legal sovereignty, and Westphalian sovereignty). See, Stephen D Krasner, ‘Problematic Sovereignty’ in Stephen D Krasner (ed), *Problematic Sovereignty: Contested Rules and Political Possibilities* (Columbia University Press 2001) 7–12; Stephen D Krasner, *Sovereignty: Organized Hypocrisy* (Princeton University Press 1999) 9–25. Werner and de Wilde object to attempts along these lines to disaggregate the concept of sovereignty into definite legal rules, arguing that to do so fails to give adequate credence to the declarative function of sovereignty (the status of ‘being sovereign’). In so doing, in the author’s opinion, they unduly conflate sovereignty with statehood. See, Werner and de Wilde (n 71) 297 *et seq.*

⁸⁶ Ross (n 75) 45.

Ross's functional critique of sovereignty shows that we cannot derive rules which determine the character and competence of the State from its "sovereign" character. Instead, he argues we should regard the core rules relating to statehood as distinct norms of international law. Ross's critique of sovereignty is effective in showing that the concept is largely devoid of substantive content. He does not, though, address the legitimacy of the concept as conventionally conceived. In fact, many of the criticisms Ross levels at the concept of sovereignty can also be applied to his three rights: if it is these three rights, for example, that determine whether an entity is a State—a legal person under international law—and these rights are themselves products of international law, it may be asked whence these rights derive their applicability. Ross does not address this question. In order to gain a more complete philosophical understanding of the concept of sovereignty, therefore, it is necessary to address the justifications of the concept in more depth.

3.2 Sovereignty as Dichotomy – the 'Legal' and 'Pure Fact' Approaches

In his ground-breaking monograph, *From Apology to Utopia*, Koskeniemi identifies two philosophical approaches to the concept of sovereignty—the 'legal' and the 'pure fact' approaches—each of which he personifies in a champion, respectively Kelsen and Schmitt.⁸⁷ For Schmitt, says Koskeniemi, a 'State's power is normative and that power is itself external to and constitutive of the law.'⁸⁸ For Kelsen, by contrast, '[f]actual power cannot establish what ought to be. [...] The legal argument is prior to factual power.'⁸⁹ As Koskeniemi observes, both approaches appear to be fundamentally flawed when viewed from within the other system of thought. From within the pure fact approach 'Schmitt's system seems objective because "realistic" and directed towards concrete observable facts.' Kelsen's,

⁸⁷ Martti Koskeniemi, *From Apology to Utopia* (Cambridge University Press 2005) 226 et seq.

⁸⁸ *ibid* 226.

⁸⁹ *ibid* 226–27.

meanwhile ‘appears utopian: his is only a scholar’s subjective construction’.⁹⁰ From within the legal approach, by contrast, ‘Schmitt’s system is subjective because apologist, because it assumes that might makes right’, while ‘Kelsen’s own ideas seem objective because detached from such considerations.’⁹¹ This is a conflict based on the very foundations of the two systems:

But it does not seem possible to take a view about the extent of sovereignty without forming an anterior stand on the question of its justification. This is so because there is no “natural” extent to sovereignty. *Its extent can only be determined within a conceptual system and the systems provided by the two approaches [the pure fact approach and the legal approach] are not only different but contradictory.*⁹²

This irreconcilability will be amply demonstrated by an account of the two approaches.

3.2.1 The Legal Approach

The legal approach presupposes the existence of “law” before the existence of a claim to the bundle of rights and competences called “sovereignty”. Thus, international law is antecedent to the State, constitutes the State, and defines its parameters:

According to this approach, sovereignty is a quality which is allocated to certain entities by international law which, in this sense, is conceptually anterior to them. [...] The law delegates to certain entities the quality of statehood as a sum of rights, liberties and competences.⁹³

According to such a view, there is no difficulty in subjecting States to international law: by their very nature they are and must inescapably be legal subjects. Clearly, though, such an approach must rely on a preceding, or “natural”, law. The existence of such a natural law—even in its modern, nontheistic form, usually based upon sociability and common interests⁹⁴—

⁹⁰ *ibid* 227.

⁹¹ *ibid*.

⁹² *ibid* 238. [Emphasis in original].

⁹³ *ibid* 229; see also Hans Kelsen, *Principles of International Law* (2nd Edn, Holt, Rinehart and Winston, Inc 1966) 581–84; Hans Kelsen, *Pure Theory of Law* (Max Knight, University of California Press 1967) 336–44; Hersch Lauterpacht, *The Function of Law in the International Community* (The Lawbook Exchange, Ltd 2000) 95–96.

⁹⁴ Koskenniemi (n 87) 231.

is contested, however. Without agreement on the validity and content of such a pre-existing law the legal approach cannot but appear subjective. Kelsen argued that the *Grundnorm* of the international legal system is that ‘states should act the way they have customarily acted.’⁹⁵ To describe this root as “natural” is, of course, controversial: Kelsen regarded his project as positivist in character, and he expressly rejected the application of natural law principles by other proponents of the legal approach.⁹⁶ Nevertheless, Kelsen’s *Grundnorm* is, like natural law, not authorised by a higher norm, but must be ‘presupposed’:

At some stage, in every legal system, we get to an authorizing norm that has not been authorized by any other legal norm, and thus it has to be presupposed to be legally valid. The normative content of this presupposition is what Kelsen has called the basic norm. The basic norm is the content of the presupposition of the legal validity of the (first, historical) constitution of the relevant legal system[.]⁹⁷

Whether one adopts Kelsen’s *Grundnorm* or a Grotian/Wolffian pre-existing moral code, therefore, the basis of the legal order under the legal approach remains controversial. While the legal approach claims to achieve an objective system by eliminating the politics of ‘might makes right’ from international law, its opponents point to its foundational uncertainty as evidence of its inherent subjectivity.

3.2.2 *The Pure Fact Approach*

The pure fact approach, by contrast, seeks to exclude the application of natural law, basing itself instead on the “objective” fact of pre-existing State liberty. For the pure fact approach all law must be *created*, it cannot simply *exist*, and the actor (the State) must logically be prior to the law, therefore. If States are prior to the law, they must have existed in a state of full

⁹⁵ Jochen von Bernstorff, *The Public International Law Theory of Hans Kelsen: Believing in Universal Law* (Cambridge University Press 2010) 161. [Footnotes omitted].

⁹⁶ *ibid* 160.

⁹⁷ Andrei Marmor ‘The Pure Theory of Law’, *The Stanford Encyclopaedia of Philosophy* (Edward N. Zalta (ed.) Fall 2010 Edition) <<http://plato.stanford.edu/archives/fall2010/entries/lawphil-theory/>> accessed 10/05/2017.

natural liberty—a state of nature—before they *chose* to subject themselves to law in order to safeguard their liberties and ensure their survival.

In the pure fact view, ‘law is a means to fulfil the liberty of the State. This may sometimes require the restriction of liberty. But liberty can only be restricted through an unambiguous rule of law.’⁹⁸ It is clear also that such a law must be contractual or voluntary in character: if States have full liberty of action prior to the institution of law they cannot be compelled to accept legal limitation. The creation of law is a political act. Ross objects to this—which he characterises as a species of self-limitation argument—saying that:

It is readily seen, however, that this construction is impossible. An obligation which is dependent on the will of the person bound is no real obligation. Either we must in all seriousness accept the idea that the state is only bound by its own will, but if so there is no real obligation, no real International Law. Or else we must seriously accept the international obligation, but in that case the state is bound by other factors than its own will, and the latter then is not “sovereign”.⁹⁹

In other words, there is therefore a significant danger of sovereignty under the pure fact approach descending into what Koskenniemi calls ‘apologism’:

[T]he conclusion that a State’s liberty extends to anything the State itself thinks appropriate to extend it to. A fully formal idea of “freedom” is incapable of constructing a determinate, bounded conception of statehood as well as giving any content to an international order.¹⁰⁰

Like Friedmann, Koskenniemi identifies that a reconciliation between the pure fact approach and an international legal order can only be effected by means of pre-existing normative content,¹⁰¹ the simplest version of which would be the principle *pacta sunt servanda*.¹⁰² This, though, is:

[...] a descending argument which stood in tension with [the] ascending denial of a pre-existing (natural) normative code and the very justification for assuming

⁹⁸ Koskenniemi (n 87) 239.

⁹⁹ Ross (n 75) 39–40.

¹⁰⁰ Koskenniemi (n 87) 225.

¹⁰¹ *ibid.*

¹⁰² Friedmann (n 7) 85–86.

that States were “free” in the first place. Just like individuality can exist only in relation to community – and becomes, in that sense, dependent on how it is viewed from a non-individual perspective – a State’s sphere of liberty, likewise, seemed capable of being determined only by taking a position *beyond* liberty. The paradox is that assuming the existence of such a position undermines the original justification of thinking about statehood in terms of an initial, pre-social liberty.¹⁰³

In this Koskenniemi must be taken to be correct. In order for the pure fact approach to avoid subjugating the existence of an obligation to the whim of the State and thus descending into apologism, it must accept a startling inconsistency: that the argument from liberty depends on a pre-existing limitation on liberty. It must, therefore, either accept apologism, or arrive at a conclusion which invalidates its premises.

3.3 Koskenniemi’s Critique – Mutual Exclusivity and Mutual Reliance

Koskenniemi presents a compelling critique of both the legal and pure fact justifications of sovereignty, showing that neither is coherent. The legal approach must rely for its validity on the pure fact approach, while the pure fact approach must ground itself in the legal approach. While this loop of infinite regress would be amply sufficient on its own to demonstrate the incoherence of both justifications, it is compounded by the irreconcilability of the two systems: the axioms of the legal approach exclude the application of the pure fact approach, and *vice versa*.

Using a Dworkin-esque lens of the “hard case”, Koskenniemi first demonstrates that neither system can, in and of itself, be applied to a hypothetical dispute between States over the extent of sovereignty.¹⁰⁴ Neither approach, he considers, is capable of providing a resolution:

In the pure fact view, law is a means to fulfil the liberty of the State. This may sometimes require the restriction of liberty. But liberty can be restricted only

¹⁰³ Koskenniemi (n 87) 225.

¹⁰⁴ For the original formulation of this approach see Ronald Dworkin, ‘Hard Cases’ (1975) 88 Harvard Law Review 1057. For a thought-provoking critique of the use of the judicial lens as a means of examining law see Andrea Bianchi, ‘Gazing at the Crystal Ball (Again): State Immunity and Jus Cogens beyond Germany v Italy’ (2013) 4 Journal of International Dispute Settlement 457, 463–65.

through an unambiguous rule of law. If such a rule is lacking, then interpretation must give effect to the original liberty in its authenticity. A problem-solver can have no authority, no justification, to decide otherwise.¹⁰⁵

By contrast, under the legal approach:

[T]here is no such anterior liberty. Behind law, there is only – law. If the law is ambiguous, we cannot solve the problem otherwise than by constructing from the legal materials available the best (most useful, most coherent, most “just”) solution possible. The point is not to give effect to some hypothetical, initial “liberty” but to consider what the law says, even if this can be determined only “constructively”.¹⁰⁶

As Koskenniemi observes:

But a choice between these two positions cannot be made. The former will ultimately end up in apologism, affirming the State’s self-definition of the extent of its sovereignty. The dispute will remain unsettled. The latter will lead into utopianism, fixing the extent of sovereignty by reference to a natural, non-State-related morality. Neither solution seems acceptable.¹⁰⁷

Under the pure fact approach both States have the competence to determine their own spheres of liberty, leaving a decision maker facing two irreconcilable claims of equal validity and rendering a decision impossible. Under the legal approach it is necessary to have recourse to natural law. Such a natural law will, however, inevitably have a highly indeterminate content. It must, logically, come prior to States—it constitutes them, and not the other way around—and must, then, be grounded not in the sociality of States but on a higher plane. Such a conception of natural law will inevitably be controversial, and cannot form an authoritative basis for international dispute settlement.

The alternative to an indeterminate moral code of this kind, says Koskenniemi, is a natural code ratified by States. It would then draw its authority not from its moral content but from its universal acceptance. But this is impossible if, as the legal approach asserts, the law exists prior to the State, because the ‘interpretative principles [of the approach] cannot be justified

¹⁰⁵ Koskenniemi (n 87) 239.

¹⁰⁶ *ibid.*

¹⁰⁷ *ibid.*

without either assuming the correctness of the pure fact view (and thus accepting self-contradiction) or some form of moral objectiveness which cannot be justified within the legal approach itself.¹⁰⁸ The legal approach, then, necessarily relies on the natural liberty of States, and thus relies on the pure fact view. The pure fact approach, though, also fails to satisfy Koskenniemi's dispute settlement test, because it gives 'each state [...] the final say about what constitutes "harm" to it, what violates its liberty. To hold otherwise would be to assume the presence of a material criterion which would overrule liberty – a criterion which the pure fact approach has excluded. [...] Hard cases can only be decided by letting each State do what it wishes.'¹⁰⁹ Thus, says Koskenniemi, the existence of a code establishing a hierarchy of liberties is necessary if dispute settlement of any level is to be possible, and '[t]hus we come back to the legal approach once again.'¹¹⁰

Koskenniemi's critique of the pure fact and legal justifications of sovereignty is both powerful and convincing. He demonstrates that no adjudicator could, either on the pure fact or the legal approach to sovereignty, render a verdict which is justified by reasons derived solely from within each approach, and to that extent he concludes that neither can offer an objective answer. More troubling, perhaps, he demonstrates that an attempt to reason through either approach to its limits in order to decide the case necessarily implicates the other approach: although each argument structurally excludes the other, it must ultimately rely on it in a futile attempt to cure its own deficiencies. Any attempt to apply the pure fact or legal approaches to any dispute over the extent of sovereignty will therefore result in a cycle of infinite regress. In thus invalidating their own premises, both approaches show themselves to be incoherent.

¹⁰⁸ *ibid* 254. [Emphasis omitted].

¹⁰⁹ *ibid* 257–58.

¹¹⁰ *ibid* 258.

One avenue for exploration remains, however. Koskenniemi's logic implies a possible route out of the pure fact/legal approach vortex, and that is if a satisfying basis can be found for the legal approach that does not depend ultimately or only on the creation of legality by States. Koskenniemi denies such a possibility, labelling it 'utopian' and arguing that such a "natural" law would be too indeterminate and controversial satisfactorily to be employed in inter-State dispute settlement – his chosen litmus test.¹¹¹ Nevertheless, Werner and de Wilde see a possibility, and they argue that an understanding of sovereignty as a social institution obviates this infinitely regressive cycle.¹¹² Their argument conceives of sovereignty as a social fact which, when spheres of action overlap, is implemented as a claim-right to justify one or other party's primacy in a particular setting. Crucially, the audience for that claim is the international community, and it is by implicating the addressee that Werner and de Wilde hope to move beyond current conceptions of sovereignty. Rather than conceiving of sovereignty (as Ross does) purely as a set of norms, they understand sovereignty as a set of norms premised on Searle's theory of social fact: that of a right to bear those competences recognised by the community to which they are addressed. Sovereignty, they argue, 'plays an important role in normative discourses by—imaginarily—bridging the gap between "is" and "ought" – a successful claim to sovereignty establishes a link between an institutional fact ("being" sovereign) and the rights and duties that follow from the existence of this institutional fact.'¹¹³ The act of recognising an entity as a State capable of being sovereign establishes both the "is" and the "ought" of its sovereignty simultaneously. It is submitted, however, that the argument made by Werner and de Wilde does not succeed in stepping beyond the apologetic/utopian tension Koskenniemi identifies, but instead preserves it. It is unclear why the claim of right made by States under this conception is more objective than any other appeal a State may make to justification for its control of a particular sphere (historical, cultural, and so on), and

¹¹¹ *ibid* 239.

¹¹² Werner and de Wilde (n 71).

¹¹³ *ibid* 284.

that it provides no additional ground on which a decision-maker can stand. The existence of a State-like entity capable of being recognised and the question of a criteria for its recognition represent the apologetic and utopian poles of vacillation, preceding from the *de facto* independence of the entity, and the enquiry thus follows the structure of an apologetic argument from fact in Koskenniemi's terms.

Nevertheless, the appeal to the social seems promising, and in the following section an argument on similar footings will be advanced. Here, though, it will be suggested that the social structure of law—through, in particular, the principle of self-determination—results in the co-evolution of sovereignty and obligation, which are conceived as mutually constitutive and reliant rather than in tension. It is submitted that, in this way, the utopian/apologetic tension can be resolved.

4. Sovereignty, Obligation and the Self-determination Structural Principle

Koskenniemi's analysis of the structure of international legal argument is a powerful demonstration of the incoherence of the sovereignty idea. Whether grounded in natural law or in the will of States it relies, he argues, on a circular reasoning which entails a rejection of its own premises, and denies the possibility of the settlement of international disputes according to law.¹¹⁴ Similar concerns led Ross to declare '[i]t is a disgrace to us that such an obvious absurdity marks the current theory of International Law',¹¹⁵ and prompted Friedmann to utter his Cassandra's warning, that

¹¹⁴ Koskenniemi (n 87) 254–58.

¹¹⁵ Ross (n 75) 41.

In due course the international legal order will no doubt either have to be equipped with a more clearly established hierarchy of norms, and more powerful sanctions, or decline and perish. The present is an era of either dawn or twilight.¹¹⁶

The sovereignty idea calls into question the idea of an international law. As argued above, however, these arguments presuppose a particular form of sovereignty, and one which has no inherent or necessary connection to the idea of international law, nor to statehood. On the contrary: the *problem of sovereignty* was a creation of the positivist thought of the long 19th century, and need not be understood as a basic or indispensable aspect of international law.

Indeed, it is argued that this—the external, absolutist—idea of sovereignty is (yet again) changing or has changed. Peters argues that the idea of “humanity” (which she treats as a term of art) has precipitated a change in the idea of sovereignty away from its 19th century meaning:

It has become clear that the normative status of sovereignty is derived from humanity, understood as the legal principle that human rights, interests, needs, and security must be respected and promoted, and that this humanistic principle is also the *telos* of the international legal system. Humanity is the A and Ω of sovereignty.¹¹⁷

Other authors, too, have noted that “classical” sovereignty no longer sits comfortably in the modern legal order. Cançado Trindade, for example, has noted that a conception of international law purely as a sovereignty-based order between States (the ‘*jus inter gentes*’) now appears to be reductive,¹¹⁸ and ‘entirely unfounded.’¹¹⁹ Similarly, Hafner has identified a number of developments, as a result of which ‘the whole fabric of international law has

¹¹⁶ Friedmann (n 7) 88.

¹¹⁷ Peters (n 62) 514. Peters also argues elsewhere that ‘State sovereignty is being recognized by positive international law as instrumental for securing the well-being of humans’: Anne Peters, *Beyond Human Rights: The Legal Status of the Individual in International Law* (Jonathan Huston tr, Cambridge University Press 2016) 6.

¹¹⁸ Antônio Augusto Cançado Trindade, ‘International Law for Humankind: Towards a New Jus Genitum (I)’ (2005) 316 *Collected Courses of the Hague Academy of International Law* 9, 257.

¹¹⁹ *ibid* 259.

become more individual-oriented',¹²⁰ Knop speaks of a possible 'trend away from the rhetoric of statism towards some form of liberal agenda' in international law,¹²¹ and Jackson has suggested the wholesale replacement of the idea of "sovereignty" with the term "sovereignty-modern"¹²² in order to separate the modern form of the idea from its 'antiquated' predecessor.¹²³ The notion has even found an approving reception in the jurisprudence of international courts:

The State-sovereignty approach has been gradually supplanted by a human-being-oriented approach. Gradually the maxim of Roman law *hominum causa ius constitutum est* (all law is created for the benefit of human beings) has gained a firm foothold in the international community as well.¹²⁴

Moreover, that the meaning of sovereignty has changed, is changing, and will (almost certainly) continue to change should not be surprising. As argued above, like all facets of socially constructed reality sovereignty is subject to recursive creation, and its nature will inevitably change as a result of system agents' shifting expectations and perceptions of social reality.¹²⁵ It was argued that ongoing changes in the modern international legal system (its "humanisation") can be explained by a shift in the structural principles which underpin the system as a whole: that the international legal system is now premised on the idea of self-determination. This structural principle, in turn, conditions and shapes the interactions of the structural properties of the system, including both the concept of sovereignty and the concept

¹²⁰ Gerhard Hafner, 'The Emancipation of the Individual from the State under International Law' (2013) 358 *Collected Courses of the Hague Academy of International Law* 263, 319.

¹²¹ Karen Knop, 'Re/Statements: Feminism and State Sovereignty in International Law' (1993) 3 *Transnational and Contemporary Problems* 293, 298. [Footnotes omitted].

¹²² John H Jackson, 'Sovereignty-Modern: A New Approach to an Outdated Concept' (2003) 97 *American Journal of International Law* 782, 785.

¹²³ *ibid* 790. See also O'Donoghue, who discusses the shift away from the Westphalian model of State sovereignty in the context of constitutionalisation: Aoife O'Donoghue, 'International Constitutionalism and the State' (2013) 11 *International Journal of Constitutional Law* 1021.

¹²⁴ *Prosecutor v Tadić* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction), ICTY-94-1 (2 October 1995), [97].

¹²⁵ See above p.21-23.

of obligation. In order to test the hypothesis of this thesis two questions are therefore posed: first, whether a conception of sovereignty and obligation which has its roots in self-determination offers a more coherent account of the two ideas (both on their own and in their interaction); and, secondly, whether a self-determination-based idea of sovereignty and obligation can explain the changes in the international legal system identified by courts and scholars. It will be concluded both that it does, and that it can, and that the hypothesis is thus, to that extent, supported.

4.1 Self-Determination and Sovereignty

This section will argue that the sovereign character of States derives from their social nature: the collectivisation of individuals into a social structure creates an aggregated, accreted right of self-determination (the *political* form of self-determination¹²⁶), which stands for the proposition that it is the people of the society and no others who are entitled to determine the principles which underpin their social and political organisation (or, put another way, their social conception of the good). These moral claims of societies are transformed on the international plane into a right of States to non-interference in internal matters, and a necessary subjection to law.

It is commonplace in a certain tradition of liberal political theory to treat the rights of the State as an aggregation of the delegated rights of individuals. The best known example of this school is perhaps Hobbes's theory of the creation of political society, whereby individuals in the state of nature contract with others to form a society for their mutual protection, ceding to the *Leviathan* a portion of their natural liberty in order to safeguard the greater part of their

¹²⁶ See above p.7-12.

rights.¹²⁷ Similar ideas can be discerned in Pufendorf's contract,¹²⁸ Grotius's sociability,¹²⁹ and the consent theories of Locke and Rousseau.¹³⁰ Each of these authors considers it straightforward that an individual may, by their consent, cede a portion of their liberty to the State, and thus imbue it with the right to act in certain ways.

These accounts have been criticised, not least because it is difficult or impossible to discern, in most societies, a "consent moment" of this kind, and because it is difficult to justify why such a moment—if and where it has occurred—would legitimate the power of the State over future generations of people. It is problematic too, following Hume, to discern why such consent should be effective unless individuals (both at the moment of the contract and in future generations) have a viable alternative.¹³¹ While it may be that in some places and at some times the consent theory of the creation of government and social order has offered a full and satisfying explanation of sovereignty (this chapter offers no opinion on that question), it seems clear that it cannot provide an explanation that is widely or universally applicable. Self-determination, on the other hand, offers a plausible explanation.

Start, as argued above, from the premise that individuals have the right individually to self-determine – that is, to the highest standard of freedom and well-being consistent with the same level of those goods being available to others, in order to realise their capacity as a rational

¹²⁷ Thomas Hobbes, *Leviathan* (Richard Tuck ed, Cambridge University Press 1991) §87.

¹²⁸ Pufendorf (n 25) 629–39.

¹²⁹ Grotius (n 23) 93, 665–66.

¹³⁰ John Locke, *Two Treatises of Government* (Peter Laslett ed, Cambridge University Press 1960) §7, 95, 128–131; Jean-Jacques Rousseau, *The Social Contract* (Maurice William Cranston ed, Penguin 1968) §3, 6; Michael DA Freeman, *Lloyd's Introduction to Jurisprudence* (6th edn, Sweet & Maxwell 1994) 101–08.

¹³¹ David Hume, 'Of the Original Contract' in Knud Haakonssen (ed), *Hume: Political Essays* (Cambridge University Press 1994) 263.

agent to live a life consistent with the reasons presented to them by their nested practical identities as being most in accordance with the realisation of their personhood.¹³² Although this idea of personal self-determination is an individual right, it is not individualistic; rather it is inherently social. It transforms, by means of an internal and external dialectic (that is, an inter-personal, social) process, the natural *desire* of the individual for the basic preconditions of the exercise of human agency into a right to the highest generally achievable forms of those goods both by means of an appeal to the universal value individuals are thus enjoined to place upon humanity (that is, the capacity as a rational agent to live a life structured by reasons) and by means of an appeal to consistency.¹³³ It is therefore a right which is exercised in a social setting: a lone individual has no right to self-determination. Their self-determination is a meaningless concept, given that their freedom of action is both entirely free from the constraint of any other will, and that it is vastly limited by the capacity of one alone to shape the world and by the necessities of survival.

The presence of the individual in a social setting gives meaning to the idea of self-determination, but it also presents challenges. Hobbes's famous warning that absent the regulation of violence human life would be 'solitary, poor, nasty, brutish, and short',¹³⁴ reminiscent also of Pufendorf's assertion that in the absence of law '[w]e should see nothing by a furious Multitude of Wolves, of Lions, of Dogs tearing and devouring one another',¹³⁵ presents a very bleak picture of humans, but one that is all too believable. As Pufendorf continues:

¹³² See above p.7-8; Korsgaard Christine M, *The Sources of Normativity* (Onora O'Neill ed, Cambridge University Press 1996).

¹³³ See above p.9-11.

¹³⁴ Hobbes (n 127) §62.

¹³⁵ Pufendorf (n 25) 100.

[...] or rather, a Monster more pernicious and more spiteful than the fiercest of these Creatures; since Man, of all Living Things, is the most able to hurt Man, and, if left to his own furious Passions, the most willing.¹³⁶

Although the dialectic process which establishes self-determination entails that each individual must recognise and concede the same rights to others as they claim for themselves, it would be both naïve and contrary to historical experience to expect this principle of internal consistency alone to provide an adequate degree of assurance of the rights of individuals. Some form of social regulation and ordering—perhaps in the form of law, law-making and law enforcing institutions—may be posited, therefore, and that necessarily implies a concept of *jurisdiction*.¹³⁷ In other words, the idea of law implies and requires that it be possible to determine *to whom* the obligations of the system apply, and *who* and *where* an individual is entitled to claim the protection of them. It is to this idea that Kelsen refers in his description of law as a *social technique*: law applies to a particular society, and therefore requires an understanding of *membership* of a society – of who is, and who is not, a part of it.¹³⁸

The laws and socio-political institutions of a society are specific techniques whereby the freedom and well-being of the individuals who compose it—that is to say, their self-determination—are preserved, maintained, and enhanced. The form that these institutions will take will be dependent on the particular needs of the individuals who comprise that society, and is the product of an ongoing process of choice of the form of socio-political organisation that best serves the needs of that social collective. The self-determination of the individuals

¹³⁶ *ibid.*

¹³⁷ Jurisdiction is not, here, intended to convey the sense of jurisdiction *over territory*, but rather is used in the more nebulous sense of *sphere of application*. It attaches primarily to the idea of the society—the polity—and only secondarily to the State as an international idea. For a feminist critique of and review of the literature relating to the idea of boundedness and of territorial jurisdiction in international law see Knop (n 121) 325–32.

¹³⁸ Hans Kelsen, *General Theory of Law and the State* (Anders Wedberg tr, Lawbook Exchange 1999) 19. It is perhaps to this idea that Walker alludes when he defines sovereignty as a claim concerning ‘the identity and status of the particular polity *qua* polity [which seeks] to provide a continuing source and vehicle of ultimate authority for the juridical order of that polity.’ Neil Walker, ‘Late Sovereignty in the European Union’ in Neil Walker (ed), *Sovereignty in Transition* (Hart Publishing 2003) 6. [Emphasis omitted].

who compose a society—its members—is implicated in its forms and structures both in that it exists for and in order to protect them and their rights, and to the extent that the forms and structures of socio-political organisation that are in place are the expression of an ongoing collective choice. It therefore follows that to impose from outside a society a different choice (or to restrict the freedom of choice) would be to substitute the competence of the members of society for that of non-members. In other words, it would be to sever the link between the society and the self-determination of its members.

The aggregated, accreted self-determination rights of the individuals in a society therefore stand for the proposition that it is the members of a society who have the right to decide on what principles that society is run. This may be referred to as *political self-determination*, which guarantees the rights of a society to determine its own form of social and political organisation, guarantees the principle of non-intervention, and underpins its jurisdiction over its people and territory.¹³⁹ These are ideas which, as discussed in Part 1, are now deeply embedded in the structure of international law, perhaps most notably in the matched pair of self-determination provisions in the Charter of the United Nations—article 1(2), and article 2(4)¹⁴⁰—and in the Declaration on Friendly Relations.¹⁴¹ A theory of sovereignty based on self-determination therefore returns the idea of sovereignty, to an extent, to its pre-Vattelien

¹³⁹ Significantly, this is not an argument that the State has a right of self-determination *as if it were* an individual itself, but rather that it has certain rights and competences *qua* a group of individuals, who are the ultimate bearers of the rights involved. It is true to say that the State is a “person” only in the sense of a term of art denoting international legal subjecthood. For an excellent discussion of this distinction see Knop (n 121) 319–28.

¹⁴⁰ Charter of the United Nations and Statute of the International Court of Justice, signed 24 October 1945, in force 24 October 1945.

¹⁴¹ Declaration on Principles of International Law concerning Friendly Relation and Co-operation among States in accordance with the Charter of the United Nations, annexed to UNGA Res 2625(XXV) 24 October 1970.

content; defining it as the right of a society to internal self-government, and its right to be free from intervention and coercive or forcible control.

4.2 Self-Determination and Obligation

Like sovereignty, it has been argued that obligation is one of the structural properties of the international legal system – that is to say, the basic and vital concepts which shape the system as it currently exists. It too, it is argued, is conditioned by (and, indeed, has its roots in) the structural principle of the system: self-determination.

The aggregated personal self-determination rights of the individuals living in a political community give rise to certain basic rights of that community, it has been argued, which may be referred to as political self-determination. This principle of political self-determination gives rise to certain moral rights of States on the international plane—those which have been described above as the State's sovereignty. That principle, too, is the basis of the concept of obligation. Those rights, far from standing in opposition to or in conflict with the idea of law, require a conception of it. As with the rights of individuals within States, the effective protection of the moral rights of States to independence, non-interference and integrity necessarily implies a form of regulation. Support for that proposition can be found in a number of philosophical approaches to the ordering of societies.

It may, first, be found in the concept of consistency. Any State which claims for itself the protection of its independence and integrity from the intervention and interference of others on the basis of its political self-determination, must necessarily recognise the rights of other political self-determination units to the same protections, if it is to be consistent. Any argument grounded in a claim of right—that is to say, any argument which goes beyond the

threat of force—must necessarily have this generalisable structure, recognising as sufficient in others that which is claimed as the basis for one's own claim.¹⁴²

Support may be found, too, in the contractual theories of law creation of Hobbes and Pufendorf, in which recognition of the personal sovereignty, so to speak, of the individual through the control of violence is a necessary prerequisite for the formation of a social order.

Hobbes declares that, in pursuit of security of person and freedom from fear,

That a man be willing, when others are so too, as farre-forth, as for Peace, and defence of himselfe he shall think it necessary, to lay down this right to all things; and be contented with so much liberty against other men, as he would allow other men against himselfe.¹⁴³

Similar protections of the individual from the control of others are the product of Rawls's veil of ignorance thought experiment,¹⁴⁴ of Finnis's exploration of practical reasonableness,¹⁴⁵ and are a common theme in natural law theory.¹⁴⁶

Obligation, then, is a direct product of self-determination, transforming moral rights-claims into rules of law which seek to protect basic independence and integrity. Such a step is vital in securing for each person those goods at the individual and societal level, and may be generalised to inter-State relations.¹⁴⁷ Without it, as Smith observed, the extent to which those rights can be realised becomes a question of what force may be mobilised in their defence:

¹⁴² It was this principle that Kant called the *categorical imperative*: that I take for myself no principle of morality that I cannot will to be a universal law: Immanuel Kant, *Critique of Pure Reason* (Paul Guyer and Allen W Wood eds, Cambridge University Press 1998) 217 (4: 416).

¹⁴³ Hobbes (n 127) §64-65.

¹⁴⁴ John Rawls, *A Theory of Justice* (Oxford University Press 1973).

¹⁴⁵ John Finnis, *Natural Law and Natural Rights* (Oxford University Press 2011).

¹⁴⁶ See, for example, the discussion of Vattel's minimum content of natural law, above p.149; Freeman (n 130) 101–08.

¹⁴⁷ Indeed, Hobbes, Pufendorf and Vattel all explicitly make this step.

Can it be said without absurdity to a small state injured by a great one, “Your cause is just: be not concerned at the poverty of your resources: in international disputes all states are equal: war, however, is the only litigation we know, and equality ends when you enter its court”?¹⁴⁸

Far from conflicting with sovereignty, then, obligation finds its roots in the same source. They are mutually constitutive and mutually reinforcing, and are both vital for the realisation of political and personal self-determination.

This section has discussed and defended the proposition that self-determination offers a compelling and coherent basis for the principles of sovereignty and obligation, both in and of themselves and in their interaction. The final section of this chapter will now consider the second question posed above: whether a self-determination-based idea of sovereignty and obligation can contribute to an explanation of the changes in the international legal system identified by courts and scholars. It will be argued that the ongoing process of humanisation of international law provides ample support for the suggestion that the meaning of sovereignty in modern day international law is evolving, and that self-determination-based sovereignty is becoming the dominant meaning of the term in international law.

4.3 Sovereignty, Obligation and the Humanisation of International Law

The process of the humanisation of international law is, and has been, both marked and precipitated by a gradual shift in the ways in which system structures and actors act towards and regard the individual, including changes of significance for the idea of sovereignty. These will be examined, in order to show that international law’s understanding of sovereignty and

¹⁴⁸ Smith (n 45) 37. On this point see further Bianchi, who criticises the sovereignty-derived doctrine of State immunity from the enforcement of international law by municipal courts: Andrea Bianchi, ‘Serious Violations of Human Rights and Foreign States’ Accountability before Municipal Courts’ in Lal Chand Vohrah and others (eds), *Man’s Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese* (Kluwer Law International 2003); Andrea Bianchi, ‘The Game of Interpretation in International Law: The Players, the Cards, and Why the Game is Worth the Candle’ in Andrea Bianchi and others (eds), *Interpretation in International Law* (Oxford University Press 2015).

obligation is increasingly consonant with the self-determination-based version of the concepts set out above. Three elements will be discussed: the emphasis on non-intervention in the Charter and related documents, restrictions on the scope of territorial integrity in the *Kosovo* Advisory Opinion, and the decline in the authority of the *Lotus* interpretation of sovereignty.

4.3.1 *The Charter and Non-Intervention*

The legal regime established by the Charter of the United Nations was a direct response to the horrors of World War Two. At the dawn of the post-war era, the original signatory States committed to a treaty which declared the use of international force to be illegal, save where exercised in self-defence or where authorised by the Security Council. Article 2(4) contained the relevant provision, which declared to be illegal ‘the threat or use of force against the territorial integrity or political independence of any state’.¹⁴⁹ It has been argued above that this provision is a mirror image of the Article 1(2) declaration that the self-determination of peoples is one of the principles to which members of the United Nations commit, jointly and severally.¹⁵⁰ Taken together, these provisions are a guarantee of the principle of political self-determination: that the form of political and social organisation of a State is a matter for the people of that State, and for no others. Notably it is to this idea—that States exist as internally independent entities under law—that the Charter refers, and not to the more expansive doctrine of sovereignty which characterised 19th and early 20th Century accounts.

These themes were subsequently developed in the Declaration on Friendly Relations.¹⁵¹ This document, which has been said by the ICJ to reflect customary law,¹⁵² was adopted by the

¹⁴⁹ Charter of the United Nations (n 140).

¹⁵⁰ See above, p.75-81.

¹⁵¹ Declaration on Friendly Relations (n 141).

¹⁵² As argued above, it appears likely that the Court found that the Declaration is customary as a whole, and it is at least clear that it reflects customary law in large part. See *Military and Paramilitary Activities In and Against*

General Assembly on the 24th October 1970 in '[d]eep[] convi[ction] that the adoption of the Declaration [...] would contribute to the strengthening of world peace and constitute a landmark in the development of international law'.¹⁵³ The *Declaration* proclaimed a number of principles, including a restatement of the Article 2(4) injunction against the 'threat or use of force against the territorial integrity or political independence of any State',¹⁵⁴ as well as the specific injunction that States shall 'not intervene in matters within the domestic jurisdiction of any State'.¹⁵⁵ Under that heading, the *Declaration* states that '[e]very State has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another State'.¹⁵⁶ Here, too, the rights of States appear to be drawn in a way which is consistent with the description of sovereignty given above.

The International Human Rights Covenants also endorse a doctrine of State sovereignty that is consistent with the self-determination-based account. Article 1 is common to both Covenants, and provides that '[a]ll peoples have a right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development'.¹⁵⁷ It was concluded above that this statement was intended by the States Parties who participated in drafting the convention to refer to the rights of States *qua* a group of people socially and politically organised.¹⁵⁸ In other words, the right to self-

Nicaragua (Nicaragua v United States of America), Merits, Judgment, (1986) ICJ Reports 14, [188]; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion (2010) ICJ Reports 403, [80]; above, p.88-89.

¹⁵³ Declaration on Friendly Relations (n 141).

¹⁵⁴ *ibid* Principle 1.

¹⁵⁵ *ibid* Principle 2.

¹⁵⁶ *ibid*.

¹⁵⁷ International Covenant on Economic, Social and Cultural Rights, signed 16 December 1966, in force 3 January 1976, 993 UNTS 3, article 1(1); International Covenant on Civil and Political Rights, signed 16 December 1966, in force 23 March 1976, 999 UNTS 171, article 1(1).

¹⁵⁸ See above, p.85-88.

determination to which the Covenant refers is the political form of the right, which applies to the people of a State as a whole and guarantees the members of a society the choice of the forms of social and political structure which they wish to implement. That the right is recognised and the link so explicitly made to the right of the people to determine their political status is another indication that the self-determination-derived right of internal sovereignty described above has been accepted in international law.

That the right to internal sovereignty has been accepted does not demonstrate that the 19th Century conception of sovereignty has been superseded, however. In the next sections aspects of the external sovereignty of States will be examined, in order to show that 19th Century sovereignty is waning, and being replaced by an internal conception of sovereignty that is consistent with the self-determination-based version described above.

4.3.2 Territorial Integrity

As Kohen has noted, territorial integrity has long been seen as an indispensable aspect of a State's sovereignty:

For States, respect of their territorial integrity is paramount. This is a consequence of the recognition of their equal sovereign character. One of the essential elements of the principle of territorial integrity is to provide a guarantee against any dismemberment of the territory. It is not only the respect of the territorial sovereignty, but of its *integrity*.¹⁵⁹

Pellet goes further, arguing that the principle of territorial integrity has acquired *ius cogens* status.¹⁶⁰ Doubt was cast on the scope and future applicability of the principle, however, in the course of the *Kosovo* Advisory Opinion of the International Court of Justice. Although the Court heard strong voices (including Azerbaijan, China, Romania, Russia, Serbia, and

¹⁵⁹ Marcelo G Kohen, 'Introduction' in Marcelo G Kohen (ed), *Secession: International Law Perspectives* (Cambridge University Press 2006) 6.

¹⁶⁰ Alain Pellet, 'The Opinions of the Badinter Arbitration Committee: A Second Breath for the Self-Determination of Peoples' (1992) 3 *European Journal of International Law* 178, 180.

Spain) in support of the proposition that States' territorial integrity is absolute and that they are entitled to its unconditional protection as a matter of international law, it held that territorial integrity is 'confined to the sphere of relations between States'.¹⁶¹ That conclusion, it was argued, represents a substantial shift in the understanding of the scope and source of territorial integrity, and one that was insufficiently justified by the Court.¹⁶²

Significantly, however, such a definition of territorial integrity would be consonant with the self-determination-based concept of sovereignty. Although States are entitled to the protection of their territory from external actors (from non-members of the polity), the aggregated self-determination of the members of the society does not provide the State with a protection against its own membership. This is, as Jovanović argues, a change in the meaning of territorial integrity, with the concept previously being understood as a right which protected the State against all.¹⁶³ There are indications, too, that this dramatic change in the understanding of territorial integrity persists beyond the Opinion of the Court, having been employed subsequently by States.¹⁶⁴ Such a change lends support to the self-determination-

¹⁶¹ *Kosovo* (n 152) [80].

¹⁶² See above, p.120-124.

¹⁶³ Miodrag Jovanović, 'After the ICJ's Advisory Opinion on Kosovo: The Future of Self-Determination Conflicts' [2012] *Annals of the Faculty of Law in Belgrade - International Edition* 292, 300–02.

¹⁶⁴ Compare, for example, the language used in Russia's Written Statement to the Court in the course of the *Kosovo* Advisory Opinion, and the justification it gave for its actions in Crimea before the Security Council. In the first setting it argued that

'The Declaration of independence [*sic.*] sought to establish a new State through separation of a part of the territory of the Republic of Serbia. It was therefore, *prima facie*, contrary to the requirement of preserving the territorial integrity of Serbia.

'Territorial integrity is an unalienable aspect of a State's Sovereignty.'

(Written Statement of the Russian Federation, 16 April 2009, *Accordance with International Law of the Unilateral Declaration of Independence In Respect of Kosovo* [76-77].) Russia then cited with approval Pellet's contention that the principle of territorial integrity 'has today acquired the character of a universal, and peremptory, norm.' (Pellet (n 160) 180, in Written Statement of Russia, [78].)

There is a marked contrast to Russia's argument in the second setting, that:

'In each particular case, one must seek the right balance between the principles of territorial integrity and the right to self-determination. It is clear that the achievement of the right to self-determination in the form of separation from an existing State is an extraordinary measure. However, in the case of Crimea, it obviously arose as a result of the legal vacuum created by the

based concept of sovereignty, and thus to the contention that there has been a deeper shift in the underlying properties and principles of the system.

4.3.3 *The Dictum in Lotus*

In its infamous *dictum* in the *Lotus* case of 1927, the PCIJ declared that the rules of international law applying to States ‘emanate from their own free will’.¹⁶⁵ For this reason, it said, States retain an expansive liberty of action ‘which is only limited in certain cases by prohibitive rules’.¹⁶⁶ This reading of the structure of international law has been understood as a declaration that States have an absolute right to undertake any action which is not expressly prohibited by international law, and it reinforces the readings of international legal obligation as based solely on the consent of States. Brierly described the reasoning as being ‘based on the highly contentious metaphysical proposition of the extreme positivist school that the law emanates from the free will of sovereignty independent states, and from this premiss [*sic.*] they argued that restrictions on the independence of states cannot be presumed.’¹⁶⁷ The rule in *Lotus* was for many years regarded as definitive of international obligation, and to an extent is so still.¹⁶⁸ There are, nevertheless, signs that it may be losing its applicability.

violent coup against the legitimate Government carried out by nationalist radicals in Kyiv, as well as by their direct threats to impose their order throughout the territory of Ukraine.’

(Mr Churkin, Permanent Representative of the Russian Federation to the UN Security Council, Security Council, Official Records, 69th Year, 7134th Meeting, 13 March 2014, S/PV.7134, 15.)

¹⁶⁵ *The Case of the S.S. “Lotus”* PCIJ, Series A, No.10, 18.

¹⁶⁶ *ibid* 19.

¹⁶⁷ Brierly (n 8) 143–44.

¹⁶⁸ Malcolm Shaw, *International Law* (7th edn, Cambridge University Press 2014) 33; Dinah Shelton, ‘International Law and “Relative Normativity”’ in Malcom D Evans (ed), *International Law* (4th edn, Oxford University Press 2014) 139.

In his Declaration to the Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, President Bedjaoui discussed in detail the application of the *Lotus* principle to international law, finding its ability to describe the modern legal system wanting. In those proceedings the Court held that it was unable fully to answer the question, concluding that ‘it cannot reach a definitive conclusion as to the legality or illegality of the use of nuclear weapons by a State in an extreme circumstance of self-defence, in which its very survival would be at stake.’¹⁶⁹ Bedjaoui was at pains to stress that the Court’s opinion should not be read as an application of the *Lotus* principle, but rather as a point on which the Court felt unable to rule in either direction – a *non liquet*. This he contrasted to the approach of the PCIJ: ‘[w]hereas the Permanent Court gave the green light of authorization, having found in international law no reason for giving the red light of prohibition, the present Court does not feel able to give a signal either way.’¹⁷⁰ On the contrary, Bedjaoui argues that the Advisory Opinion marks a definite break with the *Lotus* tradition, in that the Court—having found no express prohibition—chose not to draw any legal consequences from the absence of that prohibition.¹⁷¹ ‘No doubt this [the *Lotus*] decision expressed the spirit of the times’,¹⁷² Bedjaoui argues, but:

It scarcely needs to be said that the face of contemporary international society is markedly altered. [...] The resolutely positivist, voluntarist approach of international law still current at the beginning of the century—and which the Permanent Court did not fail to endorse in the aforementioned Judgment—has been replaced by an objective conception of international law, a law more readily seeking to reflect a collective juridical conscience and respond to the social necessities of States organized as a community.’¹⁷³

¹⁶⁹ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, (1996) ICJ Reports 226, [97].

¹⁷⁰ Declaration of President Bedjaoui, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, (1996) ICJ Reports 268, [14].

¹⁷¹ *ibid* [15].

¹⁷² *ibid* [12].

¹⁷³ *ibid* [13].

The suggestion that the international legal order has changed since the handing down of the *Lotus* decision is taken up also by others. In the same case, Judge Weermantry argued that *Lotus* no longer reflects the reality of modern international law. He declared that ‘[i]n the half century that has elapsed since the “*Lotus*” case, it is quite evident that international law [...] has] developed considerably, imposing additional restrictions on State sovereignty over and above those that existed at the time of the “*Lotus*” case.’¹⁷⁴ The same theme appears in the Declaration of Judge Simma to the *Kosovo* Advisory Opinion—where he described reliance on the *Lotus* logic as a ‘revert[on]’ to a ‘nineteenth-century positivism’ which is not appropriate to the modern day¹⁷⁵—and may also be found in the writings of academics. For Hilpold, ‘[u]nlike the situation prevailing a century ago, international law is now far more dense and no longer regulates state behaviour primarily by prohibitive rules. State interaction is far too complex [for] such an approach to be sufficient.’¹⁷⁶ Similar statements may be found in the work of Higgins (writing in an extra-judicial capacity),¹⁷⁷ Frowein,¹⁷⁸ Mann,¹⁷⁹ and Hertogen, who argues that the expansive interpretation usually taken for the principle was in any event not the meaning intended by the PCIJ.¹⁸⁰

¹⁷⁴ Dissenting Opinion of Judge Weermantry, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, (1996) ICJ Reports 429, 495–496.

¹⁷⁵ Declaration of Judge Simma, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion (2010) ICJ Reports 478, [8].

¹⁷⁶ Peter Hilpold, ‘The International Court of Justice’s Advisory Opinion on Kosovo: Perspectives of a Delicate Question’ (2009) 14 *Australian Review of International and European Law* 259, 287.

¹⁷⁷ Rosalyn Higgins, ‘International Trade Law and the Avoidance, Containment and Resolution of Disputes’ (1991) 230 *Collected Courses of the Hague Academy of International Law* 9, 114.

¹⁷⁸ Jochen A Frowein, ‘Kosovo and Lotus’ in Ulrich Fastenrath (ed), *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma* (Oxford University Press 2011) 923.

¹⁷⁹ FAP Mann, ‘The Doctrine of Jurisdiction in International Law’ (1964) 111 *Collected Courses of the Hague Academy of International Law* 1, 35.

¹⁸⁰ An Hertogen, ‘Letting Lotus Bloom’ (2015) 26 *European Journal of International Law* 901, 902–03.

However, the *Lotus* principle is not quite dead: as Hernández has observed, it has been ‘resuscitat[ed]’.¹⁸¹ Although (as noted above) in other respects the *Kosovo* Advisory Opinion lends itself to an interpretation of sovereignty that is consistent with the account given here, in this regard it presents a significant challenge. The Court took the view that in order to demonstrate that the unilateral declaration of independence was compliant with international law it was necessary only to discuss whether the act was expressly prohibited by any rule of law.¹⁸² The Court’s reasoning on this point has been criticised by Hernández, who comments that

Discarding all intermediate views, the Court arguably took the view that international law was a gapless legal order, but it did so in the most straightforward manner, adhering to the binary conception of international law in the mould of the *Lotus* judgement, and not, for example, examining the possibilities of negative permissions and prohibitions and of legal neutrality.¹⁸³

The approach has also been characterised as outdated by other academic commentators,¹⁸⁴ and received withering condemnation in the Declaration of Judge Simma, who noted of the majority’s reasoning that ‘[u]nder these circumstances, even a clearly recognized positive entitlement to declare independence, if it existed, would not have changed the Court’s answer in the slightest.’¹⁸⁵

It is not universally agreed that the *Kosovo* Advisory Opinion invoked the *Lotus* principle, however. Müller gives a different interpretation: that the Court was providing an answer strictly to the question that was asked of it. According to Müller, the majority in that case

¹⁸¹ Gleider I Hernández, *The International Court of Justice and the Judicial Function* (Oxford University Press 2014) 265.

¹⁸² *Kosovo* Advisory Opinion (n 152) [56]. For a discussion and criticism of this aspect of the Court’s Opinion see above, p.117-119.

¹⁸³ Hernández (n 181) 265. [Footnotes omitted].

¹⁸⁴ See e.g. Frowein (n 178); Hilpold (n 176).

¹⁸⁵ Declaration of Judge Simma (n 175) [8].

understood “accordance with” in the sense of the absence of a prohibition, but that it did not make the subsequent argumentative leap of equating the absence of prohibition with authorisation.¹⁸⁶ Thus, the majority’s decision that the declaration of independence ‘did not violate’ international law should be read narrowly, as an incomplete answer to a partial question:¹⁸⁷ one of, as Müller puts it, ‘illegality and non-illegality’, and not of illegality and legality.¹⁸⁸

Müller’s reading of the Advisory Opinion is ultimately unconvincing. The distinction he draws between illegality/non-illegality and illegality/legality preserves rather than avoids the *Lotus* principle, particularly in the circumstances of the case – where the question was not academic, but rather was immediate and concerned an act against the integrity of a State. It is more convincing, in the author’s opinion, to argue that the Court did fall back on the tired crutch of the *Lotus* principle—perhaps as a way of avoiding the more contentious aspects of the question¹⁸⁹—but, with Simma and others, to criticise that reliance as outdated and no longer appropriate to the international order in which it sits. It is to be hoped that *Kosovo* was an outlier, the final “hurrah!” of a doctrine on the cusp of obsolescence, and that future actions by States and judicial pronouncements will reflect its continued (if non-linear) decline. Certainly such would be the outcome recommended by a self-determination-based understanding of obligation and sovereignty. The general direction of travel described here is a(nother) factor which lends some support to this reading of these concepts, and it will

¹⁸⁶ Daniel Müller, ‘The Question Question’ in Marko Milanović and Michael Wood (eds), *The Law and Politics of the Kosovo Advisory Opinion* (Oxford University Press 2015) 131.

¹⁸⁷ *Kosovo Advisory Opinion* (n 152) [123(3)].

¹⁸⁸ Müller (n 186) 132.

¹⁸⁹ See above, p.117-119.

therefore need to be seen whether the *Kosovo* Opinion alters that general trend over the coming years and decades.

4.3.4 The Humanisation of Sovereignty and Obligation: Conclusion

This section has discussed three modern developments in international law, in order to assess whether the international legal concept of sovereignty as understood in the practice of Courts, States and International Organisations is changing. There are indications that it is so and, moreover, that it appears to be increasingly consonant with the self-determination-based understanding of the concepts set out here. It is not, however, a homogenous picture. In particular, the Opinion of the ICJ in the *Kosovo* Advisory Proceedings stands out as a reversion to an older understanding of sovereignty and the international legal system. That retrograde step is not overly troubling to the thesis presented here, however. The humanisation of international law is generally characterised as ongoing and gradual (Tomuschat describes it as ‘a crawling process’,¹⁹⁰ while Peters argues it is more appropriate to say that international law is ‘humanising’ than that it has been ‘humanised’¹⁹¹), and it is reasonable to assume that such a process will not always be linear. While the *Kosovo* example is not dispositive, therefore, it will be necessary to follow developments and, over the coming years and decades, to assess whether the direction of travel supports the conclusions drawn here.

5. Conclusion

The idea of the humanisation of international law maintains that the international legal system is in flux. There is an ongoing transformation which is reorienting international law around the individual—the human person—rather than around the interests of States and their Princes.

¹⁹⁰ Christian Tomuschat, ‘International Law: Ensuring the Survival of Mankind on the Eve of a New Century’ (1999) 281 *Collected Courses of the Hague Academy of International Law* 9, 162.

¹⁹¹ Peters (n 117) 8.

Powerful and far-reaching claims have been made of the changes occasioned by this process, perhaps none more so than Peters's declaration that in the modern international legal system '[h]umanity is the A and Ω of sovereignty.'¹⁹² This thesis argues that the mechanism for this transformation is a shift in the structural principle which underpins the system, and that self-determination now serves that purpose in international law. Such a change, it has been argued, will affect the structural properties of the system—the second level of system concepts which give shape to the system which is built upon them—and that changes at this level will both cause and will be precipitated by substantive shifts in the day-to-day operation of international law in accordance with Giddens's theory of *recursive social action*. Two of those structural properties have been considered here: sovereignty and obligation.

This chapter has shown that the doctrines of sovereignty and obligation often taken to be representative of the modern content of those concepts are not an inherent or immutable part of international law. Rather, these are concepts the meaning of which has shifted over time, and has changed in particular in response to alterations in the foundations of the legal system. A significant shift was identified in the transition from the natural law of the 18th century to the positivism of the 19th, and it was here that the *problem of sovereignty*—or the apparent irreconcilability of the 19th century's expansive conception of sovereignty with international law properly-so-called—came into being. That 19th century concept of sovereignty was shown to be philosophically incoherent, and to perpetuate a normative conflict which reduces the practical and theoretical authority of international law. Ross, quite rightly, concludes that

It is a disgrace to us that such an obvious absurdity marks the current theory of International Law.¹⁹³

Such an understanding of the concept is either meaningless, or makes meaningless international legal obligation. Friedmann has argued that:

¹⁹² Peters (n 62) 514.

¹⁹³ Ross (n 75) 41.

In due course the international legal order will no doubt either have to be equipped with a more clearly established hierarchy of norms, and more powerful sanctions, or decline and perish. The present is an era of either dawn or twilight.¹⁹⁴

By contrast, this chapter has presented a conception of sovereignty and obligation as parallel and mutually supportive concepts which find their roots in the idea of self-determination. It was found that not only are the concepts of sovereignty and obligation as described here more internally coherent and better grounded, they marry together and reinforce each other rather than being in an irresolvable utopian/apologetic conflict. Furthermore, the polity-focused understanding of sovereignty and an effective concept of obligation are consonant with a number of developments in the understanding of sovereignty discernible in the practice of Courts, States and International Organisation in recent years. Although this is not a homogenous picture, it seems eminently plausible that the ongoing humanisation of international law (which most authors describe as a gradual process) will produce an increasing number of instances in which this is so. It therefore appears that the concepts of sovereignty and obligation as they are now developing in international practice are more accurately described by a self-determination-based understanding, than by the 19th century's incoherent idea of illimitable State power.

It may be concluded, then, that the examination of sovereignty and obligation given here supports the hypothesis of this thesis; that self-determination should now be understood as the structural principle of the international legal system, and that it is driving the humanisation of international law. Certainly in this area, in relation to a concept traditionally seen as the apogee of the State, it is not the State, but rather the human, which appears to be at the centre of the international law world. The discussion, however, raises further questions about what

¹⁹⁴ Friedmann (n 7) 88.

States are and how they come to be international legal subjects, and these will be the subject of the next chapter.

Four

Statehood, Personality and Self-Determination

*Girders held up the roof; earnest moral statements
enlivened the flaking green paint. "Punk is destructive.
Society does not need it." The assertion caused him a
moment's indecision. "Oh, but society does," he wanted to
reply; "society is an association of minorities."'¹*

1. Introduction

This chapter will examine the relationship between self-determination and the closely connected ideas of statehood and personality. The hypothesis examined by this thesis posits that the self-determination structural principle shapes and gives foundation to the structural properties – the second level concepts of the system. This chapter will argue that an examination of statehood supports the hypothesis, and that self-determination is central to the statehood idea. It will adopt an ascending pattern of enquiry—it will seek elucidation in the theory of the State, and will extrapolate upwards in order to gain insight into the practical aspects of the statehood question—in order to supplement the excellent descending work (seeking insights into States in practice and “extrapolating downwards” to discover something about their natures) that has been done in recent years.² It will be argued that the term “State” as commonly used by international lawyers and others is in fact a portmanteau of two overlapping but non-equivalent ideas—termed here the State(Person) and the State(Polity)—and a third homonym, the State-like functional subject of law. Disaggregating and

¹ John Le Carré, *Smiley's People* (Pan Books 1980) 82.

² See e.g. Crawford, who uses this descending form of enquiry to great effect in his excellent *Creation of States*: James Crawford, *The Creation of States in International Law* (2nd edn, Clarendon Press 2006).

disentangling those ideas aids significantly the investigation of what States are and how they come to be, and reveals the central role played by self-determination in the process of State formation. Central to that investigation will be the closely-connected idea of the personality of States and other composite entities, and insights will be drawn from linguistics and group theory to show that individuals remain central even to non-mereological group actors – or groups that can, in a manner of speaking, “think” for themselves.

2. First Steps

‘If lawyers do not understand their own person,’ Naffine says, ‘they are lawyering in the dark. They cannot criticise or evaluate that which they cannot understand.’³ *The State* is an idea that is both entirely commonplace and deeply puzzling. The ubiquity of States and the constant presence of their effects in almost every aspect of life tends to conceal the fact that the question “what is a State” remains one of the most complex and controversial for the modern international lawyer to answer.⁴ It is, too, one of the most important: the uncertainty surrounding the question has implications both for some of the bitterest international disputes—such as the status of Kosovo, Nagorno-Karabakh and SADR—and for the international legal system as a whole. While the practical consequences of the lack of an understanding of statehood results in a system whose rules cannot be effectively applied in a number of circumstances, the macro consequence is a lack of understanding of *subjecthood*. In turn, that want of understanding speaks of a system which is insecure in its normative foundations, and that lacks one of the most basic tenets of a legal system at all: it must know

³ Ngaire Naffine, *Law’s Meaning of Life: Philosophy, Religion, Darwin and the Legal Person* (Hart Publishing 2009) 181.

⁴ As d’Aspremont has recently reminded us, international lawyers continue to disagree fundamentally on the answer to this question: Jean d’Aspremont, ‘The International Law of Statehood: Craftsmanship for the Elucidation and Regulation of Births and Deaths in the International Society’ (2014) 29 Connecticut Journal of International Law 201.

to whom it applies.⁵ In both practical and theoretical terms the system is weakened by international law's inability to describe satisfactorily either *who* or *what* its subjects are.

The definitional uncertainty surrounding States may be partly because they are constructs, and not “real” physical entities. Raič makes the point elegantly:

Standing on the moon, watching the earth from a different perspective, one sees water and land, and, if one would take a closer look, one might see mountains, rivers, forests and deserts. If one would get even closer to the surface of the earth, one would be able to distinguish cities, lakes and roads. One would, however, search in vain if one would wish to identify a “State”. The reason is obvious: the State is primarily a legal concept, created by man for certain purposes.⁶

In short: a State is not a natural entity – what Searle describes as an ‘observer independent function’.⁷ Nor does it exist as a “real” person, for as Ross observes ‘[i]n a state with 20 million inhabitants there are not 20 million and one persons.’⁸

This is the point of departure for this discussion: States are not physical entities which can be identified in the “real world”, but are “real” entities in the sense that they demonstrably exist – they have effects small and great on the lives of individuals both within and outside of their

⁵ See e.g. John Austin, *The Province of Jurisprudence Determined* (John Murray 1832) 18; Lon Fuller, *The Morality of Law* (Yale University Press 1969) 39; Joseph Raz, *The Concept of a Legal System* (2nd edn, Clarendon Press 1980) 211; HLA Hart, *The Concept of Law* (Joseph Raz and Penelope A Bulloch eds, 2nd edn, Clarendon Press 1994) 79–99, esp. 88–91; Hans Kelsen, *General Theory of Law and the State* (Anders Wedberg tr, Lawbook Exchange 1999) 19.

⁶ David Raič, *Statehood and the Law of Self-Determination* (Kluwer Law International 2002) 1.

⁷ John Searle, ‘Social Ontology and Political Power’ in Frederick F Schmitt (ed), *Socializing Metaphysics: The Nature of Social Reality* (Rowman & Littlefield Publishers inc 2003) 196: ‘To begin, we need to make a clear distinction on which the whole analysis rests, that between those features of reality which are observer (or intentionality) independent and those that are observer (or intentionality) dependent. A feature is observer dependent if its very existence depends on the attitudes, thoughts, and intentionality of observers, users, creators, designers, buyers, sellers, and conscious intentional agents generally. Otherwise it is observer or intentionality independent. Examples of observer-dependent features include money, property, marriage, and language. Examples of observer-independent features of the world include force, mass, gravitational attraction, the chemical bond, and photosynthesis.’

⁸ Alf Ross, *A Textbook of International Law: General Part* (Longmans, Green and Co 1947) 31; David Runciman, *Pluralism and the Personality of the State* (Cambridge University Press 1997) 16 et seq.

jurisdictions, and there are elements of the international system as it currently exists which cannot easily be explained without the concept. It therefore appears that there is some element to their existence which is *more than* merely the actions of the individuals who make them up, or who speak for them. In seeking better to understand the State this essay will consider *what* they are, and *how* they come to be. As will be seen, these questions are not separate but in fact are inextricably linked. It will be concluded that much of the difficulty in understanding what “States” are is linked to the use of the term “State”. Because the term can be used both in a domestic and an international context, there is an insufficiently analysed assumption that both contexts make use of a single concept. It will be argued that this is not the case, and that “State” needs to be subdivided into two concepts—referred to here as State(Polity) and State(Person)—in order to be adequately understood. For international law, therefore, the question turns out to be not “how are States formed”, but “how is a State(Polity) transformed into a State(Person).”

Having identified two meanings of “State”, it will be further argued that there are two routes to State personhood in international law. The first is an internal process which results in full personhood (and thus broadly endorses the “State as fact” theory of State-creation),⁹ while the second is an external process (which partially endorses both a theory of constitutive recognition and a theory of legally applied personhood) which results in a functional subjecthood.

2.1 The Idea of Personhood

If the concept of State is obscure and uncertain, the idea of personality is no less so. The terms “person” and “personhood” are used throughout this chapter as terms of art, denoting a ‘capacity to have an international right or duty and not merely to be at the mercy of objective

⁹ This idea is discussed below, p.227-229.

international law.¹⁰ Personality is a function of international capacity, and for this reason is often taken to apply predominantly or preponderantly to States.¹¹ Portmann notes that there is ‘almost universal agreement that states are international persons’, but that the status of various other entities—such as individuals, NGOs, armed groups and corporations—remains ‘unresolved’.¹² In the same vein, Shaw says that ‘states remain by far the moment important legal persons’ in international law,¹³ while Cassese describes States as ‘the backbone of the community’, and notes that they ‘possess full legal capacity, that is, the ability to be vested with rights, powers, and obligations’.¹⁴ Indeed, it was historically assumed that States alone were persons under international law,¹⁵ and although the growth of international organisations and the recognition of international rights of corporations, individuals and minorities (among others) has largely disabused international lawyers of this oversimplification,¹⁶ it remains common to see references to States as the “full”, “primary”, or “plenary” persons of international law. Dixon, for example, declares that ‘it is only states and certain international organisations (e.g. the UN) that have all of these capacities [to make claims, to bear

¹⁰ Anne Peters, *Beyond Human Rights: The Legal Status of the Individual in International Law* (Jonathan Huston tr, Cambridge University Press 2016) 36. [Emphasis omitted]. See also Andrea Bianchi, ‘Looking Ahead: International Law’s Main Challenges’ in David Armstrong (ed), *Routledge Handbook of International Law* (Routledge 2009) 393–95.

¹¹ For discussion of this point see Peters (n 10) 35–41.

¹² Roland Portmann, *Legal Personality in International Law* (Cambridge University Press 2010) 1; see also James Crawford, *Brownlie’s Principles of Public International Law* (8th edn, Oxford University Press 2012) 115; Bianchi, ‘Looking Ahead: International Law’s Main Challenges’ (n 10) 393–95.

¹³ Malcolm Shaw, *International Law* (7th edn, Cambridge University Press 2014) 143.

¹⁴ Antonio Cassese, *International Law* (2nd edn, Oxford University Press 2005) 71. [Emphasis omitted].

¹⁵ Jan Klabbers, *International Law* (Cambridge University Press 2013) 67; Cassese (n 14) 71–72; Janne Elisabeth Nijman, *The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law* (TMC Asser Press 2004) 7.

¹⁶ Bianchi describes it as a ‘principle of classical international law’ that is now ‘obsolete’: Andrea Bianchi, ‘State Responsibility and Criminal Liability of Individuals’ in Antonio Cassese (ed), *The Oxford Companion to International Criminal Justice* (Oxford University Press 2009) 17; see also Aoife O’Donoghue, ‘International Constitutionalism and the State’ (2013) 11 *International Journal of Constitutional Law* 1021.

obligations, to conclude agreements, and to enjoy immunities] to the fullest degree',¹⁷ while Cassese contrasts the 'full legal capacity' of States with the 'limited legal capacity' of other actors.¹⁸

These definitions seem slightly to miss the point, however. If personhood is taken to mean the ability to bear and to enjoy any and all of the available duties and rights of a legal system, it is clear that no persons can exist. As Peters correctly reminds us, no international legal persons—whether they be States, international organisations or individuals—exercise the totality of rights or are subject to the totality of obligations which exist under international law. Peters remarks that while 'no one would claim that individuals can declare war or acquire territory with international legal effect', nor can States 'enjoy human rights. In the final analysis, only partial international legal subjects exist, with a wide range of different rights and duties and very different levels of compactness.'¹⁹ Personhood, then, does not and should not be taken to speak of a "full" or "entire" gamut of legal rights and duties, but rather makes a more restrained claim to a *capacity to act in legally relevant ways*. Rather than a substantive bundle of rights and obligations, it is a metaphor drawn from municipal legal systems which draws a rough equivalence between the various kinds of international "persons" and the

¹⁷ Martin Dixon, *Textbook on International Law* (7th edn, Oxford University Press 2013) 116; see also Yaël Ronen, 'Entities that Can Be States but Do Not Claim to Be' in Duncan French (ed), *Statehood and Self-Determination: Reconciling Tradition and Modernity in International Law* (Cambridge University Press 2013) 23.

¹⁸ Cassese (n 14) 71–72. [Emphasis omitted].

¹⁹ Peters (n 10) 42–43. Indeed, as Peters argues, individuals are now acknowledged as having and being subject to a wide range of international rights and obligations that go far beyond the narrow confines of international criminal and human rights law. See *ibid*, *passim*.

position of individuals within domestic legal orders,²⁰ and should therefore immediately be treated with a certain amount of suspicion.²¹

However, neither that statement nor the use of the term “person” is here intended to imply that States and other international persons are *like* individuals in ‘any anthropomorphic or organic’ sense.²² Rather, the personhood idea utilised by contemporary international law treats States as if they exhibit some individual-like qualities – minimally, their ability within a legal system to be treated as unitary, to be treated as capable of making a claim on their own behalf, and to be treated as engaging through their actions their own responsibility.²³ In the case of individuals in a domestic setting it is clear why this should be so,²⁴ but the situation is somewhat more complex when it comes to composite “persons” such as States.²⁵ Why is it that such constructs should be treated as individual actors by law? Lauterpacht argued that to do so is only ever a fictional account: ‘states *are composed of* individual human beings; [...]

²⁰ *ibid* 35–36.

²¹ On the domestic analogy in international law see Martti Koskenniemi, ‘Global Governance and Public International Law’ (2004) 37 *Kritische Justiz* 241; and further Hidemi Suganami, *The Domestic Analogy and World Order Proposals* (Cambridge University Press 1989).

²² Hersch Lauterpacht, ‘The Grotian Tradition in International Law’ (1946) 23 *British Yearbook of International Law* 1, 27; see also discussion in Karen Knop, ‘Re/Statements: Feminism and State Sovereignty in International Law’ (1993) 3 *Transnational and Contemporary Problems* 293, 319–323 *et seq*; Naffine (n 3) 178–79.

²³ Crawford, *Brownlie’s Principles of Public International Law* (n 12) 115.

²⁴ Individuals—absent any metaphysical speculation—are unitary actors which engage their own responsibility through their actions, and their ability to be subjects of law can to a certain extent be presumed, therefore. (Although it must be noted that the ability of individuals to bear moral responsibility is a vast and important question in jurisprudence and wider philosophical thought. For a fascinating discussion of the literature on various approaches to this question see Naffine (n 3); and further William Lucy, ‘Persons in Law’ (2009) 29 *Oxford Journal of Legal Studies* 787.) In addition, it is increasingly being accepted that individuals are subjects of the international legal system as a whole, and not purely of specialist regimes such as international criminal law and international human rights law. For an discussion of the personality of the individual in international law see Peters (n 10) *esp.* Chapter 3: ‘The Doctrine of the International Legal Personality of the Human Being’; Portmann (n 12) 243–83.

²⁵ Although these questions apply equally to other composite actors such as NGOs, non-State armed groups, corporations, and—although at an additional remove—international organisations, this chapter will concentrate on States as the central focus of most accounts of international law personality and as the paradigmatic example of constructed personhood in international law.

behind the mystical, impersonal, and therefore necessarily irresponsible personality of the metaphysical state there are the actual subjects of rights and duties, namely, individual human beings.²⁶

Neither starting point will be adopted here. In contrast to the orthodox position—that States are the primary “persons” of international law and that the personality of other actors needs to be justified—this chapter will start from the position that the personhood of States cannot be presumed.²⁷ Nor, though, *pace* Lauterpacht, will it assume that the personhood of States is always and inevitably a fiction. Rather, it needs to be examined whether States are capable of performing within the international legal system the functions of an agent – the ability to engage through one’s acts one’s own responsibility. In other words, whether States can speak, act, and think *for themselves*.²⁸

Moreover, the discussion begins from the premise that the question of international legal subjecthood and the more basic question of what States *are* cannot be resolved simply by referring to international law.²⁹

We have here a vicious circle: in order to determine whether or not a certain rule is international we must know whether or not the legal community bound by it is a state. But in order to decide this question we must know precisely whether or

²⁶ Lauterpacht (n 22) 27. [Original emphasis; footnotes omitted]. International organisations, too, fit this pattern albeit, as observed above, at one additional remove. Thus international organisations are composite entities composed of composite entities; or are organisations composed of States composed of individuals.

²⁷ Nijman (n 15) 444–45.

²⁸ To that extent the approach of this chapter could be said to sit somewhere between the ‘individualistic’ and the ‘actor’ accounts in the typology of personality-claims given by Portmann: Portmann (n 12) 246–47.

²⁹ This point may be contrasted to, for example, Cassese’s approach to the question. He argues that ‘customary international law rules grant[] basic rights and duties to States [and] that these rules presuppose certain general characteristics in the entities to which they address themselves’: Cassese (n 14) 73. Portmann, too, turns to law to resolve the question: ‘It is submitted that international personality has to be administered according to a set of legal principles informed by the formal and individualistic conceptions. Accordingly, with the exception of individuals in certain situations, there are no a priori international persons: personality is acquired in international law whenever an international norm is addressed at a particular entity, without there being a presumption for or against certain units.’ Portmann (n 12) 3.

not the rule in question is international. The term “International Law” is defined by the term “state” and the definition of the term “state” again refers back to the term “International Law”. A definition thus biting its own tail is circular. The consequence is that on the point in question the definition is in reality a blank.³⁰

This does not imply that the discussion assumes an apologetic framework in which the State is understood to precede the law, nor a utopian framework of law preceding the State.³¹ Rather, this discussion strives to begin from a point of neutral on that score. Ross’s observation is understood to be definitional – that international law requires a definition of State which does not depend on international law, and *vice versa*.³² Similarly, though, the “State as fact” theory appears also to be an insufficient starting point. As already discussed, States are not “real” entities with an indisputable existence, and it is therefore impossible to deduce the existence of a State by reference to a given set of facts until it is clear *which facts are relevant*. The lack of a readable “blueprint” results in the quandary over the legal status of those entities which may bear some but not all of the hallmarks of statehood—Kosovo, the EU and Shell Corporation, for example—which continues to vex international law.

3. A Vocabulary of Statehood: Beetles in Boxes

Pain words, says Wittgenstein, are beetles in boxes.³³ Here, Wittgenstein hits upon both a characteristically insightful example, and a typically colourful metaphor. Pain words are examples of non-ostensive references – they refer to something which has no correspondence in the external world. An individual may say ‘I am in pain’, but their words can have only a very limited meaning for anyone else, because only the speaker can experience the pain to which they refer. Nevertheless, it is habitually assumed that pain phrases—headache, burning

³⁰ Ross (n 8) 12.

³¹ Martti Koskeniemi, *From Apology to Utopia* (Cambridge University Press 2005).

³² d’Aspremont identifies a similar circularity in the theory of sources of international law: Jean d’Aspremont, ‘The Idea of “Rules” in the Sources of International Law’ (2014) 84 *British Yearbook of International Law* 103, 113–19.

³³ Ludwig Wittgenstein, *Philosophical Investigations* (2nd edn, Blackwell 1958) §293.

pain, stabbing pain, throbbing pain, and so on—are transferable. When someone says “I have a stabbing pain in my stomach”, we automatically assume that we can understand what they are feeling, because we understand how we make use of the term in relation to our own experience and assume that the sensation can be generalised.³⁴ Wittgenstein constructs his metaphor of the beetle in a box to explain such words:

Suppose everyone had a box with something in it: we call it a “beetle”. No one can look into anyone else’s box, and everyone says he knows what a beetle is only by looking at *his* beetle.—Here it would be quite possible for everyone to have something different in his box. One might even imagine such a thing constantly changing.—But suppose the word “beetle” has a use in these people’s language?—If so it would not be used as the name of a thing. The thing in the box has no place in the language-game at all: not even as a *something*: for the box might even be empty.—No, one can “divide through” by the thing in the box; it cancels out, whatever it is.³⁵

In such circumstances “beetle” is vacated of meaning. It cannot have any descriptive or explanatory force because no one can say with certainty to what it refers. Indeed, the situation will often be more complex still, because the people speaking of “beetles” will generally believe that they know to what the word refers, and will tend to believe that everyone else uses the word in the same way. Any one individual may be correct that their interpretation is generally shared—or, more plausibly, certain others may share their interpretation—but the degree of convergence remains unverifiable.

Pain words are, of course, an extreme example, being a wholly internal experience. Nevertheless, it is argued that the word “State”, albeit to a lesser extent, shares many of the characteristics of beetles in boxes. Like pain words, “State” is a non-ostensive reference: it exhibits the characteristics of a parallax, seeming to alter depending on the position and perspective of the observer. In particular, “State” appears to refer to different things when

³⁴ For a discussion of pain words as an example of language relating to unverifiable experience see Marion V Smith, ‘Language and Pain: Private Experience, Cultural Significance, and Linguistic Relativity’ (Unpublished Thesis, University of Cambridge 1990).

³⁵ Wittgenstein (n 33) §293.

taken from an internal than from an external perspective, yet observers remain prisoners of these perspectives in any examination of States and their natures: ‘[t]here is no such thing as a neutral view from “nowhere” as traditional international legal scholarship wants us to believe.’³⁶ More striking still, whether viewed from the internal or external standpoint it is impossible to identify any element which is uniquely *the State*.

3.1 Internal and External Perspectives

Viewed from within, it appears impossible to sufficiently capture in any description of its constituent parts the *all-encompassing* aspect of the word “State”. An attempt to describe the “State” from the internal point of view will serve to illustrate. *State* and *Government* appear distinct, as do *State* and *Legislature* – for clearly *State* is a larger idea than either.³⁷ The State is not the civil service, whose function it is to perform the administrative tasks necessary to carry out the function of governance within the State. The State is not the police, whose task is to enforce its laws. The State is not Judge, central bank or military, nor is it individuals, communities or cities. However, while these things may be incorporated within the term “State”, it would not be automatically true to say that a State that lacked, for example, a central bank is deficient to that extent. The term “State” appears to be capable of appropriating to itself things which are not, in and of themselves, *requirements* of a State. When viewed from an internal perspective, no person or agency can be identified which embodies the personality “State”. Indeed, in addition to these functional elements, the “State” appears to include things which have none: it may be used to denote a certain geographical area, for example, or to a

³⁶ Andrea Bianchi, ‘Reflexive Butterfly Catching: Insights from a Situated Catcher’ in Joost Pauwelyn and others (eds), *Informal International Lawmaking* (Oxford University Press 2012) 203. [Footnotes omitted]. The impossibility of detaching the observer of social-scientific processes from the context in which those processes occur is also highlighted, albeit in a different context, by Giddens’s concept of the ‘double hermeneutic’: Anthony Giddens, *The Constitution of Society: Outline of the Theory of Structuration* (Polity Press 1984) 284.

³⁷ *Aguilar-Amory and Royal Bank of Canada claims (Great Britain v Costa Rica)*, (Tinoco Arbitration) (1923) 1 RIAA 369, 377-378 et seq.

population. All of these things fall within the totalising definition of “State” from an internal perspective.

Yet on the international plane, the challenge is to arrive at a definition of “State” which is sufficiently *discriminatory*, or that sufficiently captures the distinction between those elements which are a part of “the State” and those which are not. International law necessitates the characterisation of the “State” as a unitary entity—a legal person—which can act (can wage war, conduct trade, impose sanctions), which can interact (can sign treaties, conduct diplomacy, have and resolve disputes), and can cognise action (can plan, choose, justify and rationalise its actions). The “State” is also environment-aware, system-aware and self-aware, and can assess the legality, morality and political acceptability of its actions and, being capable of thought, belief and motivation, can develop an *opinio iuris* and can represent (or even misrepresent) that *opinio iuris* in its interactions with others.³⁸ A search for the bearer of that consciousness within the State is bound to fall short.³⁹ It must exclude, first of all, the territory. Although territory may be a useful concept in understanding the relative authority-claims of one State as opposed to another, territory cannot “think”, and so cannot be the actor which is sought. It must also exclude the population. Although it may be conceivable that a population can have a common thought or belief, it is not credible that the population will be the source of an international *opinio iuris*, for most individuals within the population will not be aware of the specificities of any given situation, let alone of the application to them of the corpus of international law.⁴⁰ The search must even exclude the government and the Head of State, for international obligations are not addressed to the government, but to the State itself. Only a

³⁸ Cassese, for example, speaks in terms of States being motivated to act by both by legal and other internal and external considerations (such as “social, economic or political needs”), and makes the uncontroversial point that the distinction is significant: it is only where the subjective belief on the part of States exist that their actions are mandated by law that a customary norm will be seen to emerge. See, Cassese (n 14) 157.

³⁹ For a discussion of collective consciousness see below, p.219-222.

⁴⁰ A similar observation has been made with regard to domestic law by Hart. See Hart (n 5) 114–15.

very few of the most serious international wrongs engage the individual responsibility of, for example Presidents and Prime Ministers.⁴¹ These unusual norms aside, the vast majority of international rights and obligations—maritime claims, trade agreements, sovereign debt and so on—attach to the State, and not to any figure within its government. This is not merely a technical distinction, but rather a point of some importance: it is for this reason that the international rights and obligations of the State survive changes in government, and even changes in governmental system.⁴²

In complete contrast to the internal perspective, therefore, in seeking to identify the “State” from an external perspective it is difficult or impossible to produce a definition that is sufficiently discriminatory. The State must be an actor—a person—but no individual actor within the State appears to satisfy the definition. While the internal perspective seeks to totalise, the external seeks to exclude. Notably, neither approach arrives at a satisfactory conclusion. It is suggested, however, that both are, in some sense, correct. It is not possible to prefer one point of view over the other and to declare it to be the “appropriate” position from which to assess what the State is: they are in tension. For this reason this examination will advance two conceptions of the State, viewed from the internal and external perspective. Moreover, it will be argued that both are necessarily present in any classic “State”, and that when “State” is understood as referring to two concepts it becomes significantly easier to unpick the definitional difficulties encountered thus far.

3.2 State as Polity: the Internal Perspective

⁴¹ See Bianchi, who comments that ‘[a] quick look at recent practice is sufficient to realize that state responsibility and individual criminal liability are considered as distinct in international law.’ Bianchi, ‘State Responsibility and Criminal Liability of Individuals’ (n 16) 16 et seq, [footnotes omitted]; Rome Statute of the International Criminal Court (17 July 1998) 2187 UNTS 3, preamble, Article 1.

⁴² Crawford, *The Creation of States in International Law* (n 2) 678–80.

It has been argued above that when viewed from the internal perspective it is necessary to define the State in a way that is *totalising*. When viewed in this way the State appears to contain certain elements—such as governments, police forces, cities and so on—but these do not appear to be either equivalent to it, nor necessary elements of it. The State appears to be passive – a forum of action rather than an actor in its own right. Giddens describes it as *structuration*⁴³—a recursive interaction between social structures and individual agency—and this description appears to have great explanatory potential. From the internal point of view, then, the State can be described as a *structure within which a social life is conducted* – henceforward referred to as a State(Polity).

Understanding the State(Polity) as a social structure resolves the apparent paradox of its existence. Social structures are, in Searle's terms, 'observer dependent feature[s]'; social facts that depend for their reality on individuals treating them as real.⁴⁴ That they are socially constructed does not imply States(Polities) are in any sense *unreal*, however: as Giddens comments, 'the continued existence of large collectivities or societies evidently does not depend upon the activities of any particular individual'.⁴⁵ Nevertheless, they are contingent on the continued presence of the individuals who sustain them: 'such collectivities or societies manifestly would cease to be if all the agents involved disappeared.'⁴⁶ Giddens argues that the population sustains the structure through recursive social action:

Human social activities, like some self-reproducing items in nature, are recursive.
That is to say, they are not brought into being by social actors but continually

⁴³Giddens, *The Constitution of Society: Outline of the Theory of Structuration* (n 36) 1–2. It is important to note that Giddens' observations are made in the context of an inquiry into the nature of society, rather than "the State". For this reason the vocabulary used does not comfortably transfer. Giddens uses the term "state" to refer to the governmental organs of the society, which he contrasts with "civil society" (Anthony Giddens, *The Nation-State and Violence* (University of California Press 1985) 20.).

⁴⁴ Searle (n 7) 196.

⁴⁵ Giddens, *The Constitution of Society: Outline of the Theory of Structuration* (n 36) 24.

⁴⁶ *ibid.* Put another way, to paraphrase Allott, States 'exist nowhere else than in the human mind.' Phillip Allott, 'The Concept of International Law' in Michael Byers (ed), *The Role of Law in International Politics: Essays in International Relations and International Law* (Oxford University Press 2000) 70.

recreated by them via the very means whereby they express themselves as actors. In and through their activities agents reproduce the conditions that make these activities possible.⁴⁷

Populations create the social fact called the State(Polity) moment by moment by acting in their relations towards one another, it and others *as if it exists*. Searle makes a similar point, arguing that ‘all of institutional reality is both created in its initial existence and maintained in its continued existence by way of representations that have the same logical structure as Declarations,’⁴⁸ while, in turn, a declaration is defined as a linguistic act whereby:

[W]e make something the case by representing it as being the case. [...] For example, we adjourn the meeting by saying, “the meeting is adjourned”; we pronounce someone husband and wife by saying, “I now pronounce you husband and wife.” We thus achieve world-to-word direction of fit, but we achieve that direction of fit by way of representing the world as having been changed, that is, by way of the word-to-world direction of fit.⁴⁹

“State(Polity)”—and its cognates—is not merely a description, but a speech act; an example of language as action.⁵⁰ It is a self-constituting reference which both describes and creates a situation.

That conclusion implies an account of State(Polity) creation, conceived as a linguistic act: *a State(Polity) is created where a group of individuals begin to speak of and act consistently with the presence of a social community within a bounded space*.⁵¹ Although this process of polity creation is very closely connected to self-determination, it would most likely not be accurate to describe it, in itself, as a self-determination process. Rather, it is a factual process,

⁴⁷ Giddens, *The Constitution of Society: Outline of the Theory of Structuration* (n 36) 2.

⁴⁸ John Searle, ‘Language and Ontology’ (2008) 37 *Theory and Society* 443, 451. [Emphasis omitted].

⁴⁹ *ibid*; see also John Lawrence Austin, *How to Do Things with Words* (JO Urmson and Marina Sbisa eds, 2nd edn, Harvard University Press 1975) 2–6 *et seq*.

⁵⁰ Dennis M Patterson, ‘Law’s Pragmatism: Law as Practice & Narrative’ (1990) 76 *Virginia Law Review* 937, 956.

⁵¹ Referring to State(Polity) creation as a linguistic act does not imply a contractarian model. Although a social contract moment would be consistent with the account, one is not required. All that is necessary is for the individuals within the relevant space to have a common understanding that they stand towards each other in a social and/or political relationship, and to act accordingly.

based on the manifested belief of the relevant individuals that they exist within a social order.⁵² As such, it is their *belief in the reality* of the social order that is engaged, and not (necessarily) their consent to, desire for, or choice towards engagement with the polity. Nevertheless, it cannot be decoupled from self-determination, which manifests in connection with polity-creation in two main ways. First, compliance with the self-determination of individuals in the creation of the polity is a criterion for legitimacy in polity creation and remains a legitimacy criterion for the ongoing conduct of the socio-political life of the polity (the internal facet of political self-determination);⁵³ and, secondly, the process of polity-creation effects the creation of a self-determination unit for the purposes of self-determination-based sovereignty, discussed in chapter three (the external facet of political self-determination).⁵⁴ As was argued there, the accreted individual self-determination claims of the members of a society (a polity) require that only those individuals determine the social and political forms and structures which govern their shared life, and it is within the boundaries (of whatever kind) of individual polities that this process occurs.⁵⁵

This account of State(Polity) creation implies a definition, and it is now possible to expand the definition given at the start of this section. A State(Polity) is a structure comprising a bounded space within which individuals act consistently with the presence of a common social and/or political community, and where their language refers to the existence of that structure.

⁵² There remains, of course, a question mark over the definition of “relevant individuals”. This chapter has consciously avoided defining the polity in terms of a territory. Although most (if not all) of the polities and States with which we are familiar today are territorially defined, there is no theoretical reason which this need be so. All that is necessary, as was argued in chapter three, is that it be possible to determine of a particular individual whether they are or are not a member of a particular polity at any given moment. By focusing on *belief*, this account implies that it is the individual’s subjective belief that they either are or are not a part of a society (or within its sphere of concern) which is relevant, rather than their *choice*. Nevertheless, as argued here, their choice is relevant to the question of whether the structures of the society *legitimately* apply to them.

⁵³ See above, p.7-12.

⁵⁴ See above, p.175-180.

⁵⁵ See above, p.178-179.

It therefore requires a group of individuals, action consistent with a shared social life and language which refers to the existence of that State(Polity). The State(Polity) is a self-determination unit: it is the site of politics and law, but it contains them rather than being itself reducible to them. Moreover, and more significantly for the purposes of this examination, the State(Polity) is not an actor, rather it is passive. It is a space within which there exists a base-level agreement of sociability, a structure within which individuals act, but having no ability to act of its own.

It therefore becomes necessary to ask what transforms a State(Polity) into a person.

3.3 State as Person: the External Perspective

Before it is possible to answer the question of how a person is created, it is necessary to examine what it means to say that something is a person. Personhood is the subject of a rich and growing literature which examines, *inter alia*, the many philosophical questions which are raised by this complex idea. It is, for the most part, not necessary to address these questions here, and this section will primarily focus on the more practical aspects of the question and seek to arrive at a working definition.

Naffine identifies four major schools of thought in identifying persons: legalism, rationalism, religion, and naturalism.⁵⁶ Of these, naturalism and religion can be immediately dismissed as unlikely to provide any insight into international personhood. Naturalism is defined by Naffine as a school of thought which believes persons ‘are best regarded as natural corporeal beings who can feel pleasure and pain, and who live natural mortal lives’.⁵⁷ Plainly

⁵⁶ Naffine (n 3) 20.

⁵⁷ *ibid* 24.

international persons are not natural, but instead are constructed or artificial persons,⁵⁸ and it would appear similarly absurd to claim that States fall within the religious definition of personhood. Not only does adopting the religious view of personhood entail, perforce, a leap of faith, but it cannot provide an explanation of State personhood. It should go without saying that States are not ‘ensouled’, and it seems highly unlikely that they have ‘the spark of the divine.’⁵⁹

Legalism, too, seems unlikely to offer any useful insight in the context of international law.⁶⁰ According to Naffine, Legalism is a school of thought which attempts to avoid the metaphysical debates which beset the various realist positions.⁶¹ While these approaches seek a “true” measure of personhood, legalism is ‘a strictly formal and neutral legal device for enabling a being or entity to act in law, to acquire what is known as a “legal personality”: the ability to bear rights and duties.’⁶² However, as noted above, Ross provides a compelling explanation for why a legal definition of personhood cannot apply on the international level.⁶³ Whereas under a domestic legal system a non-natural person—say a corporation or a charity—is merely a *subject* of the law, in international law a person must be both subject and *author*. This presents substantially the same problem as encountered in the context of sovereignty in the previous chapter, and results in a similar apologetic/utopian tension.⁶⁴ It is a basic premise

⁵⁸ The distinction was influentially drawn by Hobbes: Thomas Hobbes, *Leviathan* (Richard Tuck ed, Cambridge University Press 1991) §80.

⁵⁹ Naffine (n 3) 23.

⁶⁰ It should be noted that this is an argument in relation to a specific case, that of international law. It is not intended as a rejection of the utility of legalism as an explanatory framework in other jurisprudential contexts.

⁶¹ Naffine (n 3) 21.

⁶² *ibid.*

⁶³ See above, text to n 30.

⁶⁴ See above, p.164-172.

of any non-natural theory of law that law cannot pre-date its authors.⁶⁵ If, under a legalist framework, the relevant persons are creations of law, however, it is unclear who (or what) were the authors of the law which enabled the creation of persons.

Only rationalism, therefore, remains. Here Naffine points to the rationality of the person—an active, autonomous actor: someone who is positively able to bear legal duties and to assert legal rights in their own capacity⁶⁶—as the determiner of personhood. As Lucy defines it:

[R]ationalists think the legal person must be rational and not non-rational. As such, the legal person on this view must be capable of acting upon and understanding reasons. This need not mean that the legal person must be pre-eminently rational, never making mistakes as to what they have reason to do and always and ever conducting themselves in a rationally optimum way. Nor does it mean that the legal person always and ever conducts themselves on the basis of the weightiest reasons they have for acting or refraining on some, most or all occasions. It does not even mean that the legal person always and ever conducts themselves upon the basis of reasons; rather, it need only require that the legal person has the general capacity to conduct themselves upon the basis of reasons and does so much of the time.⁶⁷

On this account, then, a person is an actor (i), which is self-aware (ii), which is aware of its environment (iii), which is capable of forming reasons for acting (iv), and which can act in accordance with those reasons (although it need not always do so) (v). Such a person is, as Naffine observes, capable of understanding the legal, moral and political norms which apply to it, and of choosing whether to act in conformity with or to disobey them. It can be said to be the author of its actions, and any of its actions which breach the legal, moral or political norms applicable to it can therefore be said to engage its, and not any other's, responsibility.

⁶⁵ As Gardner comments, in the course of seeking to identify the core beliefs of legal positivism, '[w]hat should a "legal positivist" believe if not that laws are *posited*? [... A] norm is valid as a norm of [a legal] system solely in virtue of the fact that at some relevant time and place some relevant agent or agents announced it, practiced it, invoked it, enforced it, endorsed it, or otherwise engaged with it.' John Gardner, 'Legal Positivism: 5½ Myths' (2001) 46 *American Journal of Jurisprudence* 199, 200; Ronald Dworkin, 'A New Philosophy for International Law' (2013) 41 *Philosophy and Public Affairs* 2, n 13.

⁶⁶ Naffine (n 3) 60.

⁶⁷ Lucy (n 24) 795.

Before these criteria can be applied to the State, however, it is necessary to clarify and further refine certain elements, beginning with the question of whether groups can be actors for the purposes of the rationalist framework.

3.3.1 *What is an Actor?*

States, as artificial entities, have no flesh-and-blood form. They are composites; conglomerates of individuals who imbue them with certain powers, competences and purposes, and who in turn may be employed to perform certain tasks on behalf of or to represent the opinions of the entity as a whole.⁶⁸ In considering whether States, as composite entities, can be “actors” it is valuable to step outside the international law context and to consider collectivities in general. The majority of positions in this debate fall into two broad camps. The first holds that collectivities are capable of performing actions in and of themselves, in the sense that they have a “consciousness”—an ability to think and to develop purposes—that is distinct from the individuals who comprise them. When an individual performs an action that is mandated by a collectivity, therefore, it is primarily its responsibility that is engaged, and not the responsibility of the individual. The school of thought originated in the work of Hobbes,⁶⁹ although many modern accounts diverge significantly from his original description.⁷⁰ A second school, however, holds that collectivities are no more than the sum of their parts. Thus actions which are taken “on behalf of” a collectivity engage the responsibility of individuals, either the individuals who comprise it and are therefore the “true”

⁶⁸ David Copp, ‘Collective Actions and Secondary Actions’ (1979) 16 *American Philosophical Quarterly* 177, 177; Raimo Tuomela, ‘Actions by Collectives’ (1989) 3 *Philosophical Perspectives* 471, 472; Hobbes (n 58) §81-83.

⁶⁹ Hobbes (n 58) §81-83.

⁷⁰ Philip Pettit, *A Theory of Freedom: From the Psychology to the Politics of Agency* (Polity Press 2001); Philip Pettit, ‘Groups with Minds of Their Own’ in Frederick F Schmitt (ed), *Socializing Metaphysics: The Nature of Social Reality* (Rowman & Littlefield Publishers inc 2003); Frederick F Schmitt, ‘Joint Action: From Individualism to Supraindividualism’ in Frederick F Schmitt (ed), *Socializing Metaphysics: The Nature of Social Reality* (Rowman & Littlefield Publishers inc 2003); Tuomela (n 68).

authors of the action, or the individual who carried it out. These accounts find their intellectual foundations in the scholarship of Hegel.⁷¹

Giddens describes action as the exercise of power.⁷² By this he does not mean political, financial or position-related power, but rather something much more mundane. Power in this context refers to the ability of the agent to create an effect; or ‘the capability of the individual to “make a difference” to a pre-existing state of affairs or course of events.’⁷³ Put another way, Giddens says, ‘action logically involves power in the sense of transformative capacity.’⁷⁴ Defined thus, the relevant question is whether groups can produce transformative effects which are different *in kind* to those which individuals can achieve. In other words, are group actions always reducible to the sum of their parts (mereological), or can group action achieve an additional effect (synergistic).

That question, it seems, should be answered affirmatively: in certain circumstances group action can be synergistic. Indeed, it often is so even in the simplest examples. Copp argues that Massey’s example of group action—Tom, Dick and Harry carrying a piano upstairs⁷⁵—is best understood as the actions of three individuals; as mereologically attributable to the three individual actors.⁷⁶ He relies on the observation that there is no effect that is additional to the

⁷¹ Georg WF Hegel, *Elements of the Philosophy of Right* (HB Nisbet tr, Cambridge University Press 1991); see also Arthur C Danto, ‘Basic Actions’ (1965) 2 *American Philosophical Quarterly* 141; Copp (n 68); David Copp, ‘Democracy and Communal Self-Determination’ in Jeff McMahan and Robert McKim (eds), *The Morality of Nationalism* (Oxford University Press 1997).

⁷² Giddens, *The Constitution of Society: Outline of the Theory of Structuration* (n 36) 9.

⁷³ *ibid* 14.

⁷⁴ *ibid* 15.

⁷⁵ Gerald J Massey, ‘Tom, Dick, and Harry, and All the King’s Men’ (1976) 13 *American Philosophical Quarterly* 89, 89.

⁷⁶ Copp (n 68) 183–84; Massey (n 75).

combined efforts of the three actors to conclude that the action is therefore merely the sum of its parts.⁷⁷ Yet it is possible to regard this as an example of a group action *par excellence*. After all, the composite action in this case (the lifting of the piano) could not have been achieved without the efforts of all three men. Indeed, without the efforts of them all *none of the contributory actions could have been achieved*: had Tom, Dick or Harry attempted to carry the piano upstairs on his own, the result would not have been that only a part of the piano was moved, it would have been that the piano *did not move at all*.

Schmitt gives a still clearer example, one premised on the *institutional* quality of group action. Take as an example a set of three individuals—A, B and C—who together comprise the entire membership of two different committees – the library committee and the food committee.⁷⁸ When these individuals take an action as members of one committee—such as recommending that the library purchase a particular volume—it is not true to say that *both* committees have done so. The food committee has done nothing. Nevertheless, were the actions of the library committee *nothing more* than the combined individual actions of A, B and C, and were the actions of the food committee *nothing more* than the combined individual actions of A, B and C, it would not be possible to say that this was an action of one committee, rather than of both.⁷⁹ Clearly there is, in this example, a *synergistic*, rather than a *mereological* quality to the action taken (the recommending of the book). It is not explicable by the actions of A, B and C alone, but has gained an additional quality, however minimal, as a result of being a combined action taken in a particular context.

⁷⁷ Copp (n 68) 184.

⁷⁸ Schmitt (n 70) 148.

⁷⁹ *ibid* 147–50.

Viewed from this standpoint the question “can groups act” appears to be somewhat facile: of course they can. They can perform actions which individuals cannot. An example might be the passage of a piece of legislation, which gains its force not from the fact that the necessary number of individuals have supported it, but from the fact that those individuals are acting as a particular body: a legislature. The judgment of a Court does not gain its precedential force from the fact that the majority agreed on the interpretation of the point of law, nor from the status of the individuals—exactly the same individuals could have written an academic article expressing the same opinion, but the *kind* of authority the article possessed would have been quite different to that of the judgment—but from the status accorded to the group in its context.⁸⁰

It is argued, therefore, that groups are capable of action, defined (with Giddens) as the exercise of a transformative power which effects the course of events. A secondary question is whether collectivities can be *independent* actors or, in other words, whether their thoughts, beliefs and intentions can be attributed to the collectivity, rather than to their members. The distinction is significant: if collectivities can believe that a state of affairs exists, evaluate whether a response is required and what that should be, and formulate an intention to act in that manner, the collectivity is something more than a group with action-power, but should arguably be called a *person*.

⁸⁰ Hernández discusses the precedential authority of prior decisions of the ICJ, and employs Hart’s concept of content-independent authority in explaining why the Court reasons from precedent, despite the exclusion of precedential authority in the Statute of the Court. See HLA Hart, ‘Commands and Authoritative Legal Reasons’ in HLA Hart (ed), *Essays on Bentham: Studies in Jurisprudence and Philosophy* (Clarendon Press 1982) 261–66; discussed in Gleider I Hernández, *The International Court of Justice and the Judicial Function* (Oxford University Press 2014) 170.

3.3.2 *Can Collectives Think?*

The criteria for personhood set out above required that the person be an actor (i), be self-aware (ii), be aware of its environment (iii), be capable of forming reasons for acting (iv), and be capable of acting in accordance with those reasons (although it need not always do so) (v). It has been concluded above that collectivities can satisfy the first criterion, that of being an actor. It remains to be seen, however, whether groups can satisfy the other criteria (ii-v). The relevant questions, therefore, are: can groups be self-aware, can they be aware of their environments, can they formulate reasons for action, and can they then select a course of action on the basis of those reasons. These are aspects of a more general question: can collectivities think?

Contrary to first appearances, this is not a far-reaching question implying the creation of a new being ("the Group") which possesses a *durée*-consciousness analogous to that of an individual.⁸¹ Rather the question asks, similarly to action, whether there is some element to group thought which is not explained solely by the sum of the thoughts of the individuals who comprise it. Schmitt argues that this is indeed so for many groups:

We don't need to know what individuals' dispositions are to be able to predict what the Ford Corporation will do. The Corporation will act to further its interests, given its beliefs. Of course, this requires that individuals in the Corporation act in certain ways, but we do not need to consider what those ways might be, or the causes of those actions, to predict what the Corporation will do.⁸²

Schmitt is correct to observe that the Ford Corporation has certain aims, goals and institutional understandings which are internally and historically consistent. Individual employees may come and go, Board members and Chief Executives may change, but the major aims and attitudes of the Corporation would be expected to remain generally stable over time.

⁸¹ Giddens, *The Constitution of Society: Outline of the Theory of Structuration* (n 36) 3.

⁸² Schmitt (n 70) 161.

While this may be indicative of a group mind, however, it is some way short of a proof of one. Pettit has advanced an argument which demonstrates, he claims, that the decisions of collectivities need not represent the opinions of their membership, and which thus demonstrates that collective minds are separate from the minds of their members. This is so, according to Pettit, when a collectivity makes decisions by ‘deliberative reason’,⁸³ that is, when decisions made by the group are mandated by its prior attitudes and policies, or where the decision on overarching questions is mandated by decisions on component parts. Pettit uses the analogy of a workers’ co-operative to explain the concept. Let us say that a workers’ co-operative is faced with a decision of whether to give themselves a pay rise, or instead to introduce a new safety measure on a particular machine in the workshop, and let us assume for simplicity that the cost of the two measures is the same, that there are no additional funds, and that this is, therefore, a choice between mutually exclusive alternatives.⁸⁴ In order to make that decision rationally, Pettit says, the workers must individually evaluate a series of variables. In schema, these might be, first, whether there exists at present a serious danger; secondly, whether the proposed measure is likely to be effective; and thirdly, whether the pay sacrifice involved would be a bearable loss. Logically, answering “no” to any of these questions will lead the individual worker to conclude that the pay sacrifice should not be made, and it is therefore possible, he says, for every individual to conclude that the pay sacrifice should not be made, while there nevertheless remains a majority in favour of making the sacrifice in relation to each of the three sub-questions. A group which simply asks its members for a decision on the overall question, then, will find them unanimously opposed, while one which allows its overall decision to be decided by the answers to the three sub-questions will take the decision that the sacrifice should be made. Thus, the group has reached a decision

⁸³ Pettit, *A Theory of Freedom: From the Psychology to the Politics of Agency* (n 70) 110.

⁸⁴ This analogy can be found in *ibid* 107–08.

which is equivalent to that of no individual member of the group, and must, Pettit argues, therefore possess some independent mind, even if minimal.⁸⁵

This kind of decision-making, Pettit argues, is very common.⁸⁶ Indeed, he argues that there is a significant pressure for groups to take decisions in this way, in that a group that routinely adopts inconsistent positions will not be capable of presenting itself as an effective pursuer of its purposes, either to its members (who may therefore leave) or to the outside world (who will not treat it as a serious actor).⁸⁷ Instead, the pressure towards internal consistency is likely to drive the creation of a minimal form of institutional consciousness, comprised of the institutional inertia created by prior decisions, statements and positions.

Although the idea of an institutional consciousness is applicable to any organisation that has a conception of itself as a person separate from its members (hereafter an *I-collectivity*), arguably its paradigmatic example—and the subject of this enquiry—is the State. It was identified earlier that the State lacks a single locus of consciousness: it cannot be said, for example, that the consciousness of the State is located in the President, the Parliament, or the Prime Minister. A State will inevitably have a number of mouthpieces, a number of decision makers at various levels, and a history of actions that is far more complicated than Pettit's workers' collective, but which has the same hallmarks of institutional inertia. The State's mind is comprised of the statements and actions of those individuals authorised to act on its behalf, past and present (such as the Head of State, Head of Government, and plenipotentiaries); the opinions of the major domestic actors (in particular the government of the day, Parliament, the relevant decisions of Courts, and popular opinion); and its ongoing

⁸⁵ *ibid.*

⁸⁶ Pettit, 'Groups with Minds of Their Own' (n 70) 173.

⁸⁷ *ibid* 177.

policies and purposes (close relations with a neighbouring State, for example, or compliance with a treaty). Taken together, these elements result in a situation where the mind of the State, although it can be changed by many of the actors in small ways, and by some of them in more substantial ways, does not depend entirely upon any one of them. There is, therefore, an ineffably organic quality to State belief and State will which can, under Pettit's framework of deliberative reason, reasonably be described as evidence of an independent institutional consciousness.

3.3.3 State as Person

Having concluded both that collectivities can act and that institutionalised I-collectivities can think, it remains necessary to apply the criteria of personhood to such I-collectivities to establish whether they can meet the definition of a rationalist person. The relevant questions are: can collectivities act, can they be self-aware, can they be aware of their environments, can they formulate reasons for action, and can they then select a course of action on the basis of those reasons?

It has been established above that collectivities can exercise a transformative power which can affect the course of events. Although some have argued that collective action is always mereologically reducible to the actions of individuals,⁸⁸ it was argued with Schmitt that there can be a synergistic quality to group action which is not accounted for by the sum of the constitutive actions of individuals.⁸⁹ In order to take full account of the action-power collectivities can have, therefore, it is necessary to categorise them as actors in their own right. It was also concluded that institutional I-collectivities can think in a way that is not mereologically attributable to their members. To that extent, an I-collectivity may be capable

⁸⁸ See e.g. Arthur C Danto, 'Basic Actions' (1965) 2 *American Philosophical Quarterly* 141.

⁸⁹ See above, p.219-222.

of self-knowledge and self-reference (self-awareness); it can be aware of the actions of other actors and of relevant conditions for acting, such as legal, moral or political norms (environment awareness); and it is capable of formulating reasons for acting on the basis of that knowledge, and of selecting a course of action in furtherance of those reasons. Significantly, those reasons may include the institutional inertia created by its previous decisions, statements, and positions, and the resultant pressure towards consistency. An institutional I-collectivity is, therefore, capable of being a person under a rationalist framework.

4. Beetles to Butterflies: the Transformation of Polity to Person

The discussion thus far has concluded that there exist two forms of (usually) territorial social integration, both of which are commonly referred to as “the State”. It was further argued that the two forms often, if not usually, overlap, with both applying to a single socio-political community within a single bounded space. Thus, it is possible to view “the State” both from an internal and an external perspective, and each viewpoint reveals a different *kind* of entity. The different perspectives require that different elements of “the State” be prioritised: while the internal perspective was seen to be a totalising definition, the external was discriminatory, excluding much of that which the internal perspective sought to include. Viewed from the internal perspective, “the State” was defined as a State(Polity), or a structure comprising a bounded space (usually territorial) within which individuals act consistently with the presence of a common social and/or political community, and where their language refers to the existence of that structure. Put more simply, a State(Polity) refers to a *society* and its *area of concern* (its boundaries). Viewed from the external perspective, meanwhile, “the State” was defined as a State(Person). The State(Person) is an I-collectivity capable of self-awareness, environment-awareness and reasoned action, and therefore may be properly described, *pace* Hobbes, as an *artificial person*.

A number of questions are still to be addressed, however. An account of the creation of a State(Polity) has been given, but it remains to be seen how a State(Person) comes to be. This section will consider that question, and in particular whether the creation of the State(Person) occurs as a result of a process that is internal to the State(Polity), or whether that process is international. It will be concluded that both questions can be answered affirmatively, but that the entities created thereby are of different kinds. The first produces a true person of which international law must take account, while the second is a form of functional subjecthood which allows international law to regulate the action-power of an entity, notwithstanding that it does not meet the criteria for true collective personhood.

4.1 Can a State(Person) be Created as a Result of an Act Internal to a State(Polity)?

An answer to this question has already been implied by the discussion of group mind given above. There it was concluded that the existence of an institutional consciousness is a function of the internal organisation of the group, and in particular of the ways in which it makes decisions. It was concluded that imbuing a single person with the action- and thought-power of a group did not produce a person—the opinions and decisions of such a group are unlikely to amount to more than the mereological sum of their parts—but that an institutional consciousness would emerge where institutional inertia results in a form of deliberative reason.⁹⁰ That, in turn, is likely to develop where there are a number of individuals who speak and act on behalf of the group in different circumstances, and what is needed, therefore, is a *plenipotentiary rule*. The plenipotentiary rule is a constitution-rule which enables the designation of individuals (*qua* officials), both in particular situations and longitudinally, as capable of engaging the responsibility of the group.⁹¹ It is a ‘status function’, in the sense of

⁹⁰ Pettit, *A Theory of Freedom: From the Psychology to the Politics of Agency* (n 70) 107–10.

⁹¹ This is similar to the formulation given by Tamanaha to describe the creation of system officials for the purposes of Hart’s conception of law as the practice of system officials: ‘A “legal” official is whomever, as a matter of

the term used by Searle; an example of institutional reality which is a linguistic phenomenon, created and sustained by declarations (statements with a world-word and word-world direction of fit).⁹² It is therefore possible to say that an I-collectivity with an appropriate plenipotentiary rule will emerge *where the individuals within the State(Polity) begin to speak of and act consistently with the existence of a plenipotentiary rule such that individuals designated under that rule may represent the polity as a person.*⁹³

This is a process which takes place by means of, and which is enabled by, self-determination. It was argued above that the process of polity creation results in a self-determination unit – in a concept of *jurisdiction*, that enables a determination of *to whom* the obligations of the system apply, and *which* individuals may claim the protection of them.⁹⁴ In other words, polity creation is incumbent on the idea of *membership*: of who is, and who is not, a member of a particular society, and hence who is and who is not entitled to participate in the determination of its structures, processes and forms of governance.⁹⁵ A claim of this kind exists simultaneously on three levels. It makes, first, a purely factual claim to the identification of

social practice, members of the group [...] identify and treat as “legal” officials.’ Brian Z Tamanaha, *A General Jurisprudence of Law and Society* (Oxford University Press 2001) 142. [Emphasis omitted].

⁹² Searle (n 48) 452.

⁹³ It seems likely that this accurately describes the international law conception of persons as it currently exists. The Vienna Convention on the Law of Treaties declares that an individual shall be competent to bind a State where they are imbued with full powers, but it remains the sole preserve of the State how and by what means such individuals are designated, with the exception of a limited number of offices (Head of State, Head of Government, heads of relevant diplomatic missions and so on) who will automatically be taken to bind the State by their relevant actions (Vienna Convention on the Law of Treaties (concluded 23 May 1969, in force 27 January 1980) 1155 UNTS 331, Article 7.). In declaring that an individual is competent to bind the State, the individual is invested with that ability. As Aust notes, the formal document (“full powers”) is not required in order to affect this transformation: ‘A person is considered as representing a state [...] if (a) he produces appropriate full powers, or (b) it appears from the practice of the states concerned, or from other circumstances, that their intention was to consider the person as representing the state for such purposes and thus to *dispense* with full powers’: Anthony Aust, *Modern Treaty Law and Practice* (2nd edn, Cambridge University Press 2007) 77. [Original emphasis].

⁹⁴ See above, p.178-180.

⁹⁵ See above p.9-11, 178-180.

the boundaries of a society. In identifying the membership of the society its sphere of concern—its jurisdiction—is defined, and it becomes possible to define the limits of influence by individuals over societies, as well as societies over individuals. Immanent within that factual claim is a, second, normative claim, which speaks of the legitimacy of the control that societies exercise over individuals – which relates to the internal facet of political self-determination; and the legitimacy of the control that individuals and groups exercise over societies – which may relate (if the group is within a society) to the internal, or (if the group is outwith the society) to the external facet of political self-determination. Finally, it makes a prospective claim, which speaks of how the structures and processes of a society come to change: by identifying those individuals who are and who are not relevant to the change-processes of the society it enables both the factual (whose expectations and actions are relevant for the understanding of social change) and the normative (do the changes to the society respect political self-determination) aspects of the enquiry. That self-determination unit is, therefore, a necessary precursor to the development of a plenipotentiary rule: in order for a plenipotentiary to speak for a society it must first be possible to say to which society it applies.

The formation of a plenipotentiary rule—the formation of a person applying to a polity—is not merely enabled by self-determination, however; it takes place by means of a self-determination process. The formation of a plenipotentiary rule represents a choice on the part of the individuals who comprise the polity that they will engage as a single body, as a self, with other socio-political groups. That process need not be an identifiable ‘moment’, and does not require a particular method be employed, but requires that the polity begin to understand itself and speak of itself as having at its disposal a plenipotentiary rule, such that individuals can be selected to speak on behalf of the collectivity as a whole, and to engage its

responsibility. In such circumstances it becomes an I-collectivity, and may appropriately be referred to as a Person.⁹⁶

4.2 Can a State(Polity) be Transformed into a State(Person) by Means of an International Process?

The forgoing analysis has argued that legal personhood is a concept of limited utility when applied to States. This is because, as Ross has eloquently stated, international law can be defined only by reference to the State, which is its author and its plenary subject.⁹⁷ Any attempt to define personhood by reference to law therefore inevitably encounters a familiar problem: which came first? Personhood has thus far been conceived not as a creation of law, but as a function of capacity, therefore: personhood exists as a function of reality, and is a pre-legal fact of which the law must take account.

However, almost all domestic legal systems have mechanisms for the imposition of subjecthood on groups, whether or not these groups meet the criteria of a true personhood.⁹⁸

What this amounts to, in the case of imperfect persons, is not that the law thereby confers the capacity for personhood on a collectivity—it does not perfect its personhood—but rather it requires the group to act as a subject of law as a unitary entity, and grants it a certain set of

⁹⁶ Viewing this process through a self-determination lens also explains why it is that a—loosely speaking—political process within the polity can alter the polity itself. After all, the polity is both larger than and prior to politics, which can only take place once the political space has been defined (see Jeremy Waldron, ‘Two Conceptions of Self-Determination’ in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (Oxford University Press 2010) 408). The polity must, therefore, surely be on a lower—that is to say, more basic—normative plane than the political system which operates within it. Can it be correct, therefore, that the one can alter the other? Self-determination suggests an answer. Although the creation of the plenipotentiary rule has been referred to as a political process, it would be incorrect to categorise it as an act within the political system. As an act of self-determination it is better understood as an act akin to the creation of the polity itself, and it engages the same popular legitimacy. It is, therefore, a pre-political act (ibid).

⁹⁷ Ross (n 8) 12.

⁹⁸ See, for example, in UK law: Companies Act 2006 c46 Part 2, s9.

legal rights and responsibilities. To this extent, it is distinct from true personhood, and should be perhaps considered as legal subjecthood, or as *functional personhood*.⁹⁹

A number of writers have argued that collectivities should be subject to such a functional personhood. These accounts tend to focus on the collectivity's ability to cause harm, rather than on its moral personhood, and in particular on its ability to cause a harm that is of a different kind to that threatened by individual action:

This point is crucial: individual consequences, when aggregated, constitute a harm different from that of the individuals, different *in kind*. We can differentiate these kinds of harms by their ties to the capacities of the entities to whom they are causally attributed. Insofar as there is an ineliminable reference to a collective in the explanation of the production of that harm, the collective should be attributed responsibility for the production of that harm, including blame.¹⁰⁰

The ultimate goal, Crawford argues, in understanding harms produced by collectivities as such, is that those harm-producing actions can be more appropriately controlled.¹⁰¹

Here, too, there is a direct link to self-determination, although here the relevant self-determination unit is the group that is suffering, rather than the group which is causing, the harm in question. In chapter three it was argued that obligation finds its roots in self-determination. It was argued that the idea of law and legal regulation of actions is inherent in the proposition that political self-determination units have a moral right to their independence, to be free from interference, and to the protection of their integrity, and it was argued that the creation of inter-societal law is necessary for the protection of individual and collectivised

⁹⁹ This is a familiar concept in international law. Indeed, Lauterpacht argues that all international personality is of this kind: Lauterpacht (n 22) 27.

¹⁰⁰ Kenneth Shockley, 'Programming Collective Control' (2007) 38 *Journal of Social Philosophy* 442, 451; see also Marion Smiley, 'From Moral Agency to Collective Wrongs: Re-Thinking Collective Moral Responsibility' (2010) 19 *Journal of Law and Policy* 171; Brook J Sadler, 'Collective Responsibility, Universalizability and Social Practices' (2007) 38 *Journal of Social Philosophy* 486; Ronen (n 17) 31.

¹⁰¹ Neta C Crawford, 'Individual and Collective Moral Responsibility for Systemic Military Atrocity' (2007) 15 *The Journal of Political Philosophy* 187, 212.

self-determination, therefore. Harms of the kind which threaten the existence, wellbeing, integrity or independence of self-determining communities are not the creation solely of individuals, nor yet of I-collectivities. On the contrary, other groups can produce harms of these kinds, and if the self-determination of communities and the individuals who comprise them is to be protected it is therefore necessary to regulate the actions of groups which do not meet the threshold of true persons for the purposes of moral responsibility.

There must be, therefore, (at least) two routes to legal responsibility. True personhood is innate: it is a capacity-dependent trait which exists as a pre-legal fact, and as such cannot be imposed and cannot be withheld. A second route, though, allows a functional personhood to be imposed on an imperfect person with the goal of regulating those of its functions with the ability to cause harms of the relevant type. The first route, therefore, is legal responsibility as a result of moral responsibility, and applies to natural persons and true artificial persons, or I-collectivities. The second is legal responsibility as a result of action-power. It is logically necessary, however, to be able to answer the questions *to whom* a regulation is addressed, and *to whom* any sanction would apply.¹⁰² A functional person must, therefore, be an entity with a stable identity (i.e. must not be ephemeral, but have stable identifying factors, for example a stable territorial reach, leadership or membership), possessed of an action-power.

4.2.1 International Politics or International Law?

It has been concluded that true personhood cannot be imposed on an entity from above. True personhood is a function of capacity, and that capacity can be created only as the result of an internal process of self-determination. Nevertheless, a lesser, functional, subjecthood can be applied to stable entities possessed of an action-power. Where the entity thus rendered a functional person is a Polity, international law refers to the resultant functional person as a

¹⁰² Lucy (n 24) 790–91. [Footnotes omitted].

State, failing to differentiate between functionally-applied personhood and capacity-based subjecthood. It remains to be seen, however, whether the process of applying functional statehood to a polity is best understood as a process of law or of the political will of existing States.

The mechanism for the creation of functional statehood is understood as (constitutive) recognition. Two major schools of recognition exist. The first, most influentially stated by Oppenheim, holds that a decision to recognise a new State is entirely a matter of discretion on the part of the State recognising, and that no State is under a duty to recognise another.¹⁰³ It can be implied from this that no, or only a minimal, criteria pertain to recognition. The opposite position is taken by Lauterpacht, who argues that States are under a duty to recognise an entity which meets the criteria for statehood.¹⁰⁴ An examination of the process of recognition, however, suggests which understanding is to be preferred.

In recognising an entity, States make a declaration, in Searle's terms. Recognition is a statement by which they refer to the entity in question using the term "State", and it thus exhibits the double direction of fit (word-world and world-word) which Searle identifies as characteristic of declarations.¹⁰⁵ This is because the consequence of recognition is the assignation of a status function.¹⁰⁶ What has changed about the entity as a result of its recognition? In physical and institutional terms, most probably nothing. It has gained the status of "State", however, at very least in its relations with the recogniser. Recognition is,

¹⁰³ Lassa Francis Lawrence Oppenheim, *International Law. A Treatise - Volume 1: Peace* (2nd edn., Longmans, Green and Co 1912) 117.

¹⁰⁴ Hersch Lauterpacht, *Recognition in International Law* (Cambridge University Press 1947) 78.

¹⁰⁵ Searle (n 48) 455.

¹⁰⁶ *ibid* 452.

therefore, an example of a linguistic act.¹⁰⁷ By applying the word “State” to the entity in question, the recogniser declares it to be a “State”, and constitutes it (or contributes to its constitution) as such. It may be, therefore, that certain of the criteria that apply to the process (if any criteria apply) relate to the meaning of the word “State”. To put it another way, it may be that the word “State” is subject to a *language rule*. Patterson explains the concept:

The justification for any application of a rule is the internal relation exemplified by the grammar of the rule. Applying the rule correctly is a matter of grammar; correct application means no more than applying a rule in accordance with its grammar.¹⁰⁸

By contrast, if, as Oppenheim implies, the recogniser may apply the term “State” to anything, “State” would be a term which ceased to have descriptive meaning, and therefore would be nothing more than a status function. It would be more akin to Wittgenstein’s beetle in a box: a term each defines by reference to some internal standard which is not (or is not readily) communicable. It would be a term which ‘cancels out, whatever it is.’¹⁰⁹ In short, it would have no meaning other than “an entity which is granted international rights and duties.”¹¹⁰ On the contrary, however, “State” appears to be a term which retains meaning, largely because it is applied by States in more-or-less consistent ways.¹¹¹ Although individuals bear certain

¹⁰⁷ Indeed, the prevalence of such linguistic acts may support Searle’s conclusion that ‘all of institutional reality is both created in its initial existence and maintained in its continued existence by way of’ language. See *ibid* 451.

¹⁰⁸ Patterson (n 50) 949.

¹⁰⁹ Wittgenstein (n 33) §293.

¹¹⁰ Indeed, the term may not even refer to a specific or expansive set of rights and duties. As Anghie has observed, the history of international law has been comprised of a series of frameworks which limit the rights and sphere of action of certain States. (Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2004) *passim*, esp. 115-194.)

¹¹¹ The concept of *meaning* is highly uncertain and difficult to describe. Wittgenstein dedicates a substantial section of his *Philosophical Investigations* to an examination of the idea, and suggests, rather than states, an answer to the question “what is it for a word to have meaning”, and to the connected question “how does it come to be that a word has meaning for a certain group?” (Wittgenstein (n 33) §1-242.) Meaning is socially constructed. Wittgenstein begins with an example of language acquisition in infants, where words are learnt as signifiers which attach to objects, actions and so on. (§1.) This is not simply a case of learning definitions, but also of learning and contributing to a *practice*. Wittgenstein gives the example of a sign-post, which has significance for an individual only because they ‘have been trained to react to [sign-posts] in a particular way’. Thus, ‘a person goes by a sign-post only in so far as there exists a regular use of sign-posts, a custom.’ (§198.) Indeed, a system of language rules is meaningless without a consonant practice: ‘If language is to be a means of communication there must be agreement not only in definitions but also (queer as this may sound) in judgements.’ (§242.) See also Bianchi’s discussion of meaning and context in the sphere of law: Andrea Bianchi, ‘Textual Interpretation and (International) Law Reading: The Myth of (in) Determinacy and the

international rights (under, for example, the ICESCR/ICCPR) and certain international duties (not to commit certain acts designated international crimes), it would be seen as manifestly absurd to describe an individual as a “State”. Although there is disagreement in penumbral cases, therefore, it can be observed that a certain core of meaning applies to the term “State”.

Most contemporary authors recognise that Article one of the Montevideo Convention on the Rights and Duties of States is the starting point for any discussion of the meaning of statehood in contemporary international law.¹¹² The Convention, which despite having only a few States Parties is generally regarded as having entered customary law,¹¹³ declares that

The state as a person of international law should possess the following qualifications: a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with the other states.¹¹⁴

Significantly, although a number of writers have argued in recent years that the enumeration is no longer adequate and should be expanded to take into account such factors a legality of origins, minority rights, and democracy,¹¹⁵ the elements it lists—and, in particular, the first three—have remained largely stable for many years. As Grant observes, for example, Jellinek defined statehood in relation to three broadly similar elements in the 1930’s—effectiveness, population and territory—and similar criteria were widely accepted in other accounts of the time.¹¹⁶ Similarly, Hall defined statehood as an independent political community within a

Genealogy of Meaning’ in Pieter Bekker and others (eds), *Making Transitional Law Work in the Global Economy - Essays in Honour of Detlev Vagts* (Cambridge University Press 2010) *passim*, esp. 41-42.

¹¹² Crawford, *The Creation of States in International Law* (n 2) 36; Montevideo Convention on the Rights and Duties of States (26 December 1933).

¹¹³ Grant notes that the Montevideo criteria have become a ‘touchstone for the definition of the State’: Thomas D Grant, ‘Defining Statehood: The Montevideo Convention and Its Discontents’ (1998–99) 37 *Colombia Journal of Transnational Law* 403, 416.

¹¹⁴ Montevideo convention (n 112) Article 1.

¹¹⁵ See e.g. Crawford, *The Creation of States in International Law* (n 2) 89–95; Grant (n 113) esp. 453; Milena Sterio, ‘A Grotian Moment: Changes in the Legal Theory of Statehood’ (2010–11) 39 *Denver Journal of International Law and Policy* 209.

¹¹⁶ Grant (n 113) 416.

defined territory.¹¹⁷ In fact, the markers of statehood, in a form recognisable today, can be seen in the writings of Bodin in the 1570s,¹¹⁸ and Grotius in the 1620s.¹¹⁹

Not only do these criteria appear to have been broadly accepted as an accurate definition of a State by publicists, but they appear to have been accepted by States themselves. During the course of the *Kosovo* advisory proceedings, a number of States submitted written comments to the Court, some of which addressed the question of whether Kosovo could claim to be a State. Although differences existed between the participants as to whether recognition is constitutive or declaratory, all of those States which addressed the issue referred either to the Montevideo criteria themselves or a similar list of requirements of statehood. Serbia, for example, noted that '[t]he requirements of statehood focus upon the criteria of population, territory and governance',¹²⁰ while Luxembourg referred to the need for a 'defined territory, a settled population, and an effective government',¹²¹ and Japan, although arguing that recognition is constitutive, stated that

For the formation of a State, international law generally requires that an entity shall meet the conditions of Statehood, namely an entity holds an effective government which governs a permanent population within a defined territory. The question of whether an entity fulfils these requirements usually comes into play in the context and in the phase of recognition by other States.¹²²

Japan's position is illuminating. It suggests that, although Japan conceived of statehood as a matter of recognition, States are not unfettered in the exercise of their power to recognise.

¹¹⁷ *ibid* 417.

¹¹⁸ Jean Bodin, *Six Books of the Commonwealth* (Tooley (tr), Basil Blackwell 1967).

¹¹⁹ Hugo Grotius, *The Rights of War and Peace* (Richard Tuck tr, Liberty Fund 2005).

¹²⁰ Written Statement of Serbia, 17 April 2009, *Accordance with International Law of the Unilateral Declaration of Independence In Respect of Kosovo* [416].

¹²¹ Written Statement of Luxembourg, 30 March 2009, *Accordance with International Law of the Unilateral Declaration of Independence In Respect of Kosovo* [16].

¹²² Written Statement of Japan, 17 April 2009, *Accordance with International Law of the Unilateral Declaration of Independence In Respect of Kosovo* 2.

Lalos characterises States as ‘gatekeepers’, who ‘ensure that de facto states meet the criteria outlined under the Montevideo Convention.’¹²³ Mugerwa argues on similar lines that ‘there appears to be universal acceptance of the rule that recognition must be accorded only when all the conditions of statehood are fulfilled.’¹²⁴

These criteria have come under attack in recent years, however. Grant is particularly forthright, denouncing the Montevideo criteria as ‘over-inclusive, under-inclusive, and outdated.’¹²⁵ He correctly identifies that a number of entities which have appeared to meet the Montevideo criteria—such as Rhodesia—have not been recognised, while entities with serious defects in terms of the criteria have been treated as States.¹²⁶ He identifies a list of eight criteria which, he says, would at least have to be given serious consideration, were a new international instrument on the lines of the Montevideo Convention to be drafted. These include independence; a claim to statehood; self-determination; internal and external legality; the existence of a people joined by historical, cultural, religious or other factors; and United Nations membership, as well as a formal requirement of recognition.¹²⁷ By contrast, although Sterio agrees that additional criteria should now be applied to the process of State creation (such as recognition by regional States and the great powers, respect for human and minority

¹²³ Dimitrios Lalos, ‘Between Statehood and Somalia: Reflections of Somaliland Statehood’ (2011) 10 Washington University Global Studies Law Review 789, 800.

¹²⁴ Nkambo Mugerwa, ‘Subjects of International Law’ in Max Sørensen (ed), *Manual of Public International Law* (MacMillan 1968) 277.

¹²⁵ Grant (n 113) 453.

¹²⁶ *ibid* 442–47.

¹²⁷ *ibid* 450–51.

rights and acceptance of international law), she argues that these are best considered to be sub-elements of Montevideo's ill-defined fourth criterion, capacity.¹²⁸

A somewhat weaker claim is advanced here. It is argued that the Montevideo Convention criteria should be not regarded as a list of requirements for Statehood, but rather as an iteration of a definition generally understood. Thus, while significant disagreements remain when faced with penumbral cases, States, commentators and others share a schematic understanding of what it is to be a "State". In short, that the term "State" is a term defined: "State" is subject to a language rule.

In the context of functional statehood, then, States are not entirely at liberty to recognise as "State" whatsoever they wish (the Oppenheim position): rather they must take account of the meaning of the word "State". The precise ambit of the definition would require a review of State practice that is beyond the scope of this chapter, but it is possible to make a number of observations. It is settled practice, for example, that States are territorial entities, although it is accepted that the borders of the territory in question need not be precisely delineated.¹²⁹ Similarly, States are populous, and an entity without a population will not be considered a State.¹³⁰ Thirdly, States are polities – that is so say, a group of individuals arranged within a

¹²⁸ Sterio, 'A Grotian Moment: Changes in the Legal Theory of Statehood' (n 115) 2010.

¹²⁹ In its judgment in the *North Sea Continental Shelf* case the ICJ commented that: 'There is for instance no rule that the land frontiers of a State must be fully delimited and defined, and often in various places and for long periods they are not': *North Sea Continental Shelf*, Judgment, (1969) ICJ Reports 3, [46]. Crawford comments that 'even a substantial boundary or territorial dispute with a new State is not enough, of itself, to bring statehood into question. The only requirement is that the State must consist of a certain coherent territory effectively governed': Crawford, *The Creation of States in International Law* (n 2) 52.

¹³⁰ Lauterpacht argues that a State must possess 'a population subject to the natural process of renewal and growth' (Lauterpacht (n 104) 48.), although it is worth noting, with Duursma, that '[n]o reservations have been made by the international community with respect to statehood because of the limited number of nationals of micro-states.' Jorri Duursma, *Fragmentation and the International Relations of Micro-States: Self-Determination and Statehood* (Cambridge University Press 1996) 118.

socio-political community.¹³¹ Finally, an entity will not be regarded as a State if it is under an effective authority-claim by another State.¹³² For that reason, a sub-State unit cannot be recognised as a State under international law, and breakaway regions will be recognised only once the State recognising believes that the region has successfully displaced the authority-claim of the former power.¹³³

It can be concluded, then, that States are not free to exercise unfettered discretion in the course of recognising new States. However, it may not be correct to characterise certain of the limitations on State action in this regard as obligations, nor as stemming from law. Although certain legal rules do apply to the recognition process (such as the obligation not to recognise an entity over which an existing State exercises an authority-claim),¹³⁴ and it may be that legal rules exist in parallel with the limitations discussed here, it was found that States are primarily limited by the constraints of language. States are not ‘bound’, in the sense of being subject to a norm, but rather are guided by a language rule: they cannot apply the term “State” to an entity which is manifestly ill-suited to bear the term because to describe the entity as a “State” *would not make sense*. It is, thus, both a less stringent and less certain guide to behaviour than a legal rule, but is perhaps stronger in that it is somewhat isolated from deliberate change

¹³¹ The classic formulation is Vattel’s, now usually taken as a truism: ‘A nation or State is, as has been said at the beginning of this work, a body politic, or a society of men united together to promote their mutual safety and advantage by means of their union.’ Emer de Vattel, *The Law of Nations; or Principles of the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns* (G G and J Robinson 1797) 15.

¹³² Vattel argued that entities which are in certain ways dependent upon others will not necessarily be denied statehood on that account. The significant factor is authority. He declares that States ‘acknowledge no other law, than that of nations’ (ibid 17.), and by implication holds that entities which acknowledge the rule (the authority-claim) of another cannot be considered States. Crawford, similarly, states that: ‘A new State attempting to secede will have to demonstrate substantial independence, both formal and real, from the State of which it formed part before it will be regarded as definitively created.’ Crawford, *The Creation of States in International Law* (n 2) 63.

¹³³ Crawford, *The Creation of States in International Law* (n 2) 63.

¹³⁴ John Dugard, *Recognition and the United Nations* (Grotius Publications Limited 1987) 86–90; UNSC Res 5002 (24 November 1961); UNSC Res 497(1981) (17 December 1981); UNGA Res 37/123A (16 December 1982); *East Timor (Portugal v Australia)*, Judgment, (1995) ICJ Reports 90.

(although meaning may naturally shift over time). Of course, as with any rule, there remains significant room for disagreement in penumbral cases, but these will not normally present a challenge to the meaning of the word itself, rather focusing on whether a particular set of facts fall just inside the definition or are excluded by it: the core features of the definition are usually accepted by both disputants and, indeed, are therefore reinforced rather than damaged by the dispute.

5. Conclusion

This chapter has argued that the concept of self-determination, already found to play a vital role in founding and shaping sovereignty and obligation, is also central to two more of international law's structural properties: statehood and personality. That conclusion demands a reassessment of the relative positions of States and individuals and communities in international life, and a change of emphasis in the way States are perceived. In particular, the Montevideo paradigm of statehood—which casts the presence of individuals as a criterion which must be met by would-be States—does not appear adequately to capture the centrality and importance of individuals for statehood. Viewed through a sociological lens and facilitated by a disaggregation of the various entities to which the term “State” can refer—the State(Polity), the State(Person) and the State-like functional subject of law—self-determining individuals and communities are revealed as being inescapably central to the statehood idea, which depends entirely upon them for its continued existence. As Giddens comments, entities of these kinds ‘manifestly would cease to be if all the agents involved disappeared.’¹³⁵

Three forms of “State” were identified, each of which has an intimate connection to self-determination. The State(Polity) is a social structure within which individuals conduct a

¹³⁵ Giddens, *The Constitution of Society: Outline of the Theory of Structuration* (n 36) 24.

shared socio-political life within a bounded space. It is a social fact, recursively created by the declarative actions of the individuals who live within it, and it engages both the internal and the external facets of the political self-determination of that community. Most significantly, it is a political self-determination unit for the purposes of the self-determination based conception of sovereignty discussed in chapter three, providing the necessary understanding of membership for the proposition that interference with the internal processes of the polity by external actors (individuals and groups) is illegitimate.

The State(Polity), too, is the basic societal unity within which a State(Person) may emerge. This second—co-extensive but non-equivalent—idea of “State” emerges where the necessary institutional structures exist to permit the collective entity (“the community” or “the group”) to act on its own behalf, in ways that are not mereologically attributable to the individuals who comprise it. In contrast to the State(Polity), which is passive, the State(Person) is an actor on the international plane which is appropriately a legal person in its own right. The creation of such a personhood was characterised as a self-determination process: a choice by the individuals inhabiting a State(Polity) to develop a *plenipotentiary rule*, or the institutional structures necessary to allow designated individuals to represent the community as a single entity.

Finally, it was argued that collective entities which lack a “true” personhood may nevertheless be subjected to international law as functional subjects. Like full personhood, that conclusion is implied, too, by the analysis of sovereignty and obligation conducted in the previous chapter.¹³⁶ There it was concluded that the question of whether an entity is sovereign—defined as being entitled to independence and protection from external interference—is a

¹³⁶ See above, p.172 et seq.

factual question, based on whether a socio-political community exists such that the personal self-determination rights of the individuals who comprise it form an accreted, aggregated right to political self-determination. A political self-determination unit of that kind has a right to determine without external interference the principles on which its social and political life will be conducted, and the concept of obligation to law is therefore necessarily implied. Significantly, however, this analysis decouples sovereignty and international personality: it would be perfectly possible for an entity entitled to the protection of its sovereignty of the kind described here to be a State(Polity) which lacked a plenipotentiary rule, and therefore to be capable of being only an imperfect or functional legal subject. That it lacked full personhood would, however, neither justify withholding from it the protection of its sovereignty and its self-determination, nor of leaving unregulated whatever action-power it possesses, potentially to the detriment of other individuals and communities.

As with the concepts of sovereignty and obligation, the analysis presented here supports the proposition that self-determination is deeply embedded in the ideas of statehood, personality and subjecthood. That the concept plays such a vital role in shaping and conditioning these structural properties of the international legal system supports the hypothesis of this thesis, that self-determination should now be understood as the system's structural principle, and it supports, too, the suggestion that the centrality of self-determination in international law is furthering the humanisation of international law. The previous chapter concluded that it is not the State but the human which should now be seen as the centre of the international law world. By defining States *as* and *for the protection of* self-determining communities rather than—as does, for example, Montevideo—simply as *containing* individuals, this chapter goes further still, and begins to break down the distinctions between the two.

Five

Peremptory Normativity and Self-Determination

*Schnee fiel, als man sich's erzählte
in einer östlichen Stadt
vor einem Kinderkreuzzug
der in Polen begonnen hat.*

*Da trippelten Kinder hundernd
in Trüpplein hinab die Chausseen
und nahmen mit sich andere, die
in zerschlossenen Dörfern stehn.*

*Sie wollten entrinnen den Schlachten
dem ganzen Nachtmahr
und eines Tages kommen
in ein Land, wo Frieden war.¹*

1. Introduction

In 1969 an idea that had for many years existed on the outskirts of international law gained mainstream recognition. Although it had been alluded to in 1867 by Bluntschli, to whom Sarkin attributes the first reference,² the inclusion of the idea of “higher order” rules—norms which would invalidate even subsequent conflicting provisions—in the Vienna Convention on the Law of Treaties was a revolutionary moment in the development of modern

¹ Bertolt Brecht, ‘Kinderkreuzzug 1939’ in HR Hays (ed), *Selected Poems of Bertolt Brecht* (Harcourt Brace Jovanovich 1959) 148.

² Jeremy Sarkin, ‘Why the Prohibition of Enforced Disappearance Has Attained *Jus Cogens* Status in International Law’ (2012) 81 *Nordic Journal of International Law* 537, 554. The most influential early reference to *ius cogens* was very likely that of Verdross in his famous 1937 essay: Alfred Verdross, ‘Forbidden Treaties in International Law’ (1937) 31 *American Journal of International Law* 571; see also discussion in Aoife O’Donoghue, ‘Alfred Verdross and the Contemporary Constitutionalization Debate’ (2012) 32 *Oxford Journal of Legal Studies* 799.

international law.³ These “peremptory” norms, or norms “*ius cogens*”, have since been seen as representing a basic morality of the international community; a minimum requirement of humanity built into international law.

This chapter will argue that the connection between self-determination and *ius cogens* lends further support to the hypothesis of this thesis: that the influence of self-determination is humanising international law. It will first examine the relationship between *ius cogens* and the concept of self-determination in its personal and political forms—those branches of the self-determination genus embedded in international law as structural principles⁴—and will argue that the concept of *ius cogens*, like the concept of obligation which it modifies, finds its roots in the protection of self-determining individuals and communities. Section three will then identify certain norms as *ius cogens*, before sections four and five examine the identification of substantive *ius cogens* norms, and argue that self-determination contributes, too, to the formation of norms of *ius cogens* status. It will be shown that the connection to self-determination is not in itself sufficient to constitute a norm as peremptory, but it will be argued that the function of protecting individual or political self-determination is nonetheless a central criterion in the identification and creation of norms *ius cogens*.

The chapter will conclude that it is, at a minimum, credible to argue that *ius cogens* norms reflect the demands of protecting individual and group self-determination, and that the privileged position given to self-determination in modern international may help to explain the development of relative normativity. It will, however, conclude also that international

³ Bianchi comments, for example, that ‘[h]ad some of the parties to the Vienna Convention clearly foreseen the consequences of letting such a Trojan horse into the international legal system, it is not unreasonable to speculate that the Convention would have fewer parties than it currently has.’ Andrea Bianchi, ‘Dismantling the Wall: The ICJ’s Advisory Opinion and Its Likely Impact on International Law’ (2004) 47 German Yearbook of International Law 343, 42–44. [Footnotes omitted].

⁴ See above p.23–25.

norms *ius cogens* represent a *system* morality, and not an *objective* morality. As such the creation of new norms *ius cogens* is a social phenomenon, and not a purely philosophical one.

2. The Concept of Norms *Ius Cogens*

Although *ius cogens* norms have had international legal effect since the entry into force of the Vienna Convention on the Law of Treaties (VCLT) in January 1980, there remains something about the concept of *ius cogens* which seems to defy satisfactory definition. Two routes are commonly used by scholars attempting this task: they may, first, ground the concept entirely in the text of the VCLT and in its antecedents, and define the concept according to its *effects*.⁵

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.⁶

Under this approach, *ius cogens* norms are defined as *those norms from which no derogation is permitted*, together with the restriction that alteration of the canon of *ius cogens* norms make take place only by means of a subsequent *ius cogens* norm.⁷ But as Jiménez de Aréchaga has observed:

This description of *jus cogens* fails to apprehend its real essence, since the definition is based on the legal effects of a rule and not on its intrinsic nature; it is not that certain rules are rules of *jus cogens* because no derogation from them is permitted; rather, no derogation is allowed because they possess the nature of rules of *jus cogens*.⁸

⁵ See e.g. Lauri Hannikainen, *Peremptory Norms (Jus Cogens) in International Law: Historical Development, Criteria, Present Status* (Finnish Lawyers Publishing Company 1988) 2–3 et seq.

⁶ Vienna Convention on the Law of Treaties, signed 23 May 1969, in force 27 January 1980, 1155 UNTS 331, Article 53.

⁷ Hannikainen (n 5) 3. This approach has been characterised by Linderfalk as the ‘Legal-Consequences-as-Criterion Theory’: Ulf Linderfalk, ‘What is So Special about Jus Cogens? – On the Difference between the Ordinary and the Peremptory International Law’ (2012) 14 International Community Law Review 3, 4. [Emphasis omitted].

⁸ Eduardo Jiménez de Aréchaga, ‘International Law in the Past Third of a Century’ (1978) 159 Collected Courses of the Hague Academy of International Law 1, 64. Indeed, Simma describes this definition as ‘tautological’:

It is, perhaps, this dissatisfaction with an effect-definition that leads Orakhelashvili and others to focus instead on a *purposive* examination of *ius cogens*. Orakhelashvili argues that *ius cogens* norms should be seen as a form of ‘international public order’,⁹ which ‘resembles conceptually [...] constitutional limitations in terms of on what the law-makers can freely enact.’¹⁰ He continues, ‘peremptory norms operate as a public order protecting the legal system from incompatible laws, acts and transactions. As with every legal system, international law can be vulnerable to infiltration of the effect of certain norms and transactions which are fundamentally repugnant to it.’¹¹ In other words, on this argument *ius cogens* norms have a system-building function.¹²

Although Orakhelashvili’s characterisation of *ius cogens* as international public order has by no means been universally accepted,¹³ this view suggests that the most significant feature of such norms is not their non-derogable or compulsory character *per se*, but rather their *uniformity*. The common, coalescing, and convergent functions of *ius cogens* norms require States—despite the multi-speed nature of international rule-making—to share a common core

Bruno Simma, ‘From Bilateralism to Community Interest in International Law’ (1994) 250 *Collected Courses of the Hague Academy of International Law* 217, 286–87; see also Roland Portmann, *Legal Personality in International Law* (Cambridge University Press 2010) 262, but see *contra* Linderfalk, who challenges the characterisation of Article 53 as circular: Ulf Linderfalk, ‘The Creation of Jus Cogens – Making Sense of Article 53 of the Vienna Convention’ (2011) 71 *Zeitschrift Für Ausländisches Öffentliches Recht und Völkerrecht* 359.

⁹ Alexander Orakhelashvili, *Peremptory Norms in International Law* (Oxford University Press 2006) 7 *et seq.*

¹⁰ *ibid* 10; see also Andrea Bianchi, ‘Individual Accountability for Crimes Against Humanity: Reckoning with the Past, Thinking of the Future’ (1999) 19 *SAIS Review* 97, 116–17.

¹¹ Orakhelashvili (n 9) 10.

¹² Christopher A Ford, ‘Adjudicating Jus Cogens’ (1994–95) 13 *Wisconsin Journal of International Law* 145, 160–63.

¹³ See e.g. Christenson, who criticises the public order idea of *ius cogens* as an inappropriate application of a municipal law analogy: Gordon A Christenson, ‘Jus Cogens: Guarding Interests Fundamental to International Society’ (1988) 28 *Virginia Journal of International Law* 585, 598–602. Yarwood, too, objects to the association of *ius cogens* norms with public policy, arguing that in order to be useful to the international legal order *ius cogens* must ‘stand on its own two feet’: Lisa Yarwood, ‘Jus Cogens: Useful Tool or Passing Fancy? A Modest Attempt at Definition’ (2006) 38 *Bracton Law Journal* 16, 16–17.

of obligations out of which they cannot contract even by mutual consent. By this means international rules are elevated from “mere” contracts between States to form a cohesive body of law.¹⁴

The argument that peremptory norms perform a systematising function invokes a concern felt by some international lawyers that the transition at the beginning of the long 19th century from natural law to positivism resulted in an international law that lacked a legal “system”. The concern seems justified: certainly, as discussed above, the period was characterised by significant concerns over the “bindingness” of international law,¹⁵ and even whether international law should be considered “law” properly-so-called at all.¹⁶ It was at this time, too, that fragmentation became ‘inherent to, and a logical consequence of, the nature of international law itself’,¹⁷ and although the voluntarist nature of treaty relations would, whatever the basis of the international legal system, make a fully homogeneous legal order a vanishingly small probability, the Study Group of the International Law Commission on Fragmentation of International Law attributed the high degree of fragmentation in international law to the ‘spontaneous, decentralized and unhierarchical nature of international

¹⁴ Although see, *contra*, Christenson, who objects to the suggestion of a systemising function to *ius cogens* norms saying that ‘[t]he world community distrusts embracing this kind of myth as a means to legitimate action.’ Christenson (n 13) 631.

¹⁵ See above, chapter three.

¹⁶ John Austin, *The Province of Jurisprudence Determined* (John Murray 1832) 171.

¹⁷ Joost Pauwelyn, ‘Fragmentation of International Law’, *Max Planck Encyclopaedia of Public International Law* (Max Planck Society/Oxford University Press 2006) [7]. It may also be indicative that there was, as Schwelb describes, a growing interest in the concept of an international *ordre publique* during the twentieth century: Egon Schwelb, ‘Some Aspects of International Jus Cogens as Formulated by the International Law Commission’ (1967) 61 *American Journal of International Law* 946, 949–60.

law-making’ that is a particular characteristic of the post-natural law international legal order.¹⁸

Whether or not the concept of *ius cogens* norms was conceived as an opportunity to re-introduce a systematising element into international law—a sort-of non-natural *ius naturæ* for the 20th century¹⁹—it appears to fill something of the void left by the demise of natural law.²⁰

As Koskenniemi notes:

[T]he importance of the notion [of *ius cogens*]*—like the importance of erga omnes obligations—may lie less in the way the concepts are actually “applied” than as signals of argumentative possibilities and boundaries for institutional decision-making. To that extent, the notions alleviate the extent to which international law’s fragmentation may seem problematic.*²¹

Indeed, the choice of terminology—*cogens*—may also imply that such a role was anticipated for the concept.²² Bearing the double meaning of “that body of rules which compels” and

¹⁸ Martti Koskenniemi, ‘Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law’ [2006] Report of the Study Group of the International Law Commission, UN Doc A/CN.4/L.682, [486].

¹⁹ Yarwood characterises this as a ‘remarkable attempt at self-preservation’ by positivist international law thought: Yarwood (n 13) 23; see also Ford (n 12) 149; Evan J Criddle and Evan Fox-Decent, ‘A Fiduciary Theory of Jus Cogens’ (2009) 34 *Yale Journal of International Law* 331, 337–338 et seq; Andrea Bianchi, ‘Human Rights and the Magic of Jus Cogens’ (2008) 19 *European Journal of International Law* 491, 492.

²⁰ Pellet comments that ‘the existence of norms of a superior value is as ancient as international law, [but] the conception of *jus cogens* is recent and tightly linked with the elaboration, then the adoption, of the Vienna Convention.’ Alain Pellet, ‘Comments in Response to Christine Chinkin and in Defense of Jus Cogens as the Best Bastion against the Excesses of Fragmentation’ (2006) 17 *Finch Yearbook of International Law* 83, 89. See also Murray and O’Donoghue, who argue that fragmentation, if not creative of *ius cogens* norms, has spurred their mainstream recognition, particularly by the ICJ: Colin RG Murray and Aoife O’Donoghue, ‘A Path Already Travelled in Domestic Orders? From Fragmentation to Constitutionalisation in the Global Legal Order’ (2017) 13 *International Journal of Law in Context* 225.

²¹ Koskenniemi (n 18) [409]. [Emphasis added]. For an alternative take on the role of *ius cogens* in the context of fragmentation see Paulus, who argues that *ius cogens* may play a role in recognising and reinforcing the common values of the international community. Nevertheless, he strikes a warning note, characterising norms *ius cogens* both as offering a means to constrain power, and as a tool for the furtherance of hegemonic forces in the system. Andreas L Paulus, ‘Jus Cogens in a Time of Hegemony and Fragmentation: An Attempt at a Re-Appraisal’ (2005) 74 *Nordic Journal of International Law* 297.

²² Lauterpacht (n11); Fitzmaurice (n 11).

“that body of rules which draws together” the phrase *ius cogens* hints at a more complex (and perhaps more significant) role played by the concept than is often appreciated.²³

Like the effect definition, such a purposive reading of *ius cogens* points towards significant features of the concept, but perhaps does not advance understanding of what *ius cogens* norms are. It has been indicated that *ius cogens* norms both guarantee certain intransgressible principles and have a systematising function, but something more is needed. It is in this vein that Weatherall characterises *ius cogens* as an element of a Liberal approach to international law, ‘a deontological, individual-oriented perspective that maintains the fundamental purpose of all law to be the good of the human being.’²⁴ In other words, *ius cogens* norms are a guarantee of certain basic rights pertaining to the individual which States, for reasons of morality and consent, must respect.²⁵ Weatherall characterises this as a form of supra-State social contract, an idea formed at the ‘confluence of an individual-oriented normative structure, a State-based legal order, and values common to the international community as a whole.’²⁶

Weatherall’s invocation of the social contract is not, ultimately, convincing. Social contract theory in the context of national societies has received a great deal of criticism, much of which originates in Hume’s response to the theories of Locke and others of his mind.²⁷ Hume argued

²³ Charlton T Lewis and Charles Short, ‘Cōgo’, *A Latin Dictionary, Founded on Andrews’ edition of Freund’s Latin dictionary revised, enlarged, and in great part rewritten by Charlton T Lewis, PhD and Charles Short, LLD* (Clarendon Press 1879).

²⁴ Thomas Weatherall, *Jus Cogens: International Law and the Social Contract* (Cambridge University Press 2015) xxxix.

²⁵ See also Paulus (n 21) 332.

²⁶ Weatherall (n 24) xli.

²⁷ David Hume, *A Treatise of Human Nature: Being an Attempt to Introduce the Experimental Method of Reasoning into Moral Subjects* (Thomas Longman 1740) vol III, Part II, §8.

both that the idea of the promise as the foundation of political society is incoherent, and that no living person has ever made such a promise.²⁸ Individuals do not consent to society, Hume says: rather they are born into it. How much more true this is of nations and States, for although the individual social contract may be somewhat redeemed (although not, perhaps, convincingly) by the argument that an individual impliedly consents to the rule of a State by remaining within its borders despite the opportunity to leave,²⁹ States cannot remove themselves from the purported sphere of application of international law, nor avoid entirely interaction with States and actors in the international society more broadly.

A similar argument is advanced by Criddle and Fox-Decent, who argue that norms *ius cogens* are an expression of what they term a State's *fiduciary duty* to its subjects.³⁰ Grounding *ius cogens* in a Kantian view of humanity,³¹ they argue that the 'innate right of humanity of the person',³² together with the relationship of dependence that exists between State and subject,³³ 'renders the beneficiary's entrusted interests immune to the fiduciary's appropriation of those interests.'³⁴ This fiduciary relationship, they argue, not only results in the category *ius cogens* but also dictates its terms.³⁵ Criddle and Fox-Decent's theory has much to recommend it, and a not dissimilar argument is advanced here. It does not appear, however, wholly satisfying as an explanation of *ius cogens*, because it is not clear whether (and if so, why) in such a case an

²⁸ *ibid* §8:9; see also David Hume, 'Of the Original Contract' in Knud Haakonssen (ed), *Hume: Political Essays* (Cambridge University Press 1994) 189–94.

²⁹ Harry Beran, 'A Liberal Theory of Secession' (1984) 32 *Political Studies* 21, 25; but see, contra, Hume (n 28) 193.

³⁰ Criddle and Fox-Decent (n 19) 347–48.

³¹ *ibid* 352 *et seq.*

³² *ibid* 348.

³³ *ibid* 352–54.

³⁴ *ibid* 354.

³⁵ *ibid* 355 *et seq.*

individual would enjoy the protection of norms *ius cogens* against States other than their own. By cognising *ius cogens* as a corollary of the State-subject relationship they are particularised to that relationship. It is submitted here, by contrast, that the category *ius cogens* only makes sense if the norms are *general*, and that a generalising step is needed to transform the logic Criddle and Fox-Decent employ into a more satisfying theory.

Nevertheless, these approaches suggests an avenue for inquiry. It has been argued that self-determination, in its various forms, structures the international legal system, and it has been shown that its influence both shapes the interplay between sovereignty and obligation, and that it moulds international law's approach to statehood and personality. These observations speak of a legal system in which individuals—singly or grouped as communities, or “peoples”—play a central and defining role. The question is naturally posed, therefore, whether there is a connection (as was found with sovereignty and statehood) between *ius cogens* and self-determination, and whether a connection of that kind can provide the generalising influence that the fiduciary theory appears to lack.

It is submitted that it can. Indeed, it is argued that only a connection to the structural concept of self-determination could explain the functions *ius cogens* norms serve in international law and justify the subjugation of the expressed will of States. It has been concluded that sovereignty and obligation both find their footings in self-determination. When it forms international obligations, the State exercises the competence of the self-determination unit which stands behind it. The principle of self-determination itself, therefore, stands behind those obligations and supports the principle that, in general, the obligations entered into by States should not by other peoples be gainsaid. That principle is far from unlimited, however, and it necessarily follows from the characterisation of self-determination as the wellspring of obligation that ordinary legal obligations, founded in the consent of States and in the obligation

of States to fulfil their commitments under international law, cannot conflict with self-determination itself.³⁶ In short, it is the connection between the category *ius cogens* and self-determination that underpins the capacity of *ius cogens* norms to invalidate obligations entered into by States.³⁷

The conclusion that the category of *ius cogens* finds its roots in the structural concept of self-determination in international law demands the corollary conclusion that individual *ius cogens* norms are an expression of self-determination. The source of the principle of obligation is in the protection of individual and aggregated self-determination, and it is therefore incapable of underpinning any rule destructive of those ends.³⁸ Phrased, then, as prohibitions on State action or on the boundaries of legality (“States shall not...”; “States shall not contract to...”), *ius cogens* norms express basic protections of individual and collective self-determination in substantive international law. The next section will test this hypothesis in relation to those norms generally considered to be of the character *ius cogens*, in order to discover whether a link between the substantive *ius cogens* norms and self-determination can be maintained.

³⁶ The ultimate principle Criddle and Fox-Decent apply to the determination of norms derived from the fiduciary relationship is that *ius cogens* norms will protect the agency of the individual, offering a clear parallel to the focus on self-determination suggested here: *ibid* 365.

³⁷ This is an argument of the kind Christenson approvingly refers to as an argument from the fundamental interests of a global society, meaning ‘not the survival of the states system but the security and well-being of all people.’ While he regards this as the appropriate position from which to approach questions of *ius cogens*, he rightly sounds the note of warning that ‘[s]tudents of international law and relations should have no illusions’ of the continued dominance in international affairs of sovereign States who seek primarily to protect their own interests (p. 648, footnotes omitted): Christenson (n 13) *passim*.

³⁸ Bianchi comments, albeit in another context, that ‘the law cannot tolerate acts that run against its very foundation.’ Bianchi, ‘Individual Accountability for Crimes Against Humanity: Reckoning with the Past, Thinking of the Future’ (n 10) 116.

3. The Identification of Norms *Ius Cogens*

The identification of norms *ius cogens* is more problematic territory even than the elucidation of the nature of the category itself.³⁹ Although a relatively stable list of oft-cited (perhaps even consensus) candidates has gradually emerged in the literature, justifications of the status accorded to the norms generally point to a weight of academic opinion,⁴⁰ or to the decisions of Courts and Tribunals, which have famously tended to provide somewhat scant reasoning for these findings.⁴¹ It is perhaps this tendency to invoke somewhat mystical indications that lie outside of the primary sources of international law that leads Bianchi to declare that ‘international lawyers have acted as “magicians”, administering the rites of *jus cogens* and invoking its magical power’, whether in the capacity of scholars, counsel or judges.⁴²

Although the lack of a robust and widely-accepted identification process for norms *ius cogens* means that it is challenging to identify these norms with confidence, certain norms of international law are now sufficiently widely accepted as being peremptory by States, courts

³⁹ Simma notes in this regard that the ‘formalistic definition of *jus cogens* provided in Article 53 of the Vienna Convention creates more problems than it solves.’ Simma (n 8) 290; see also Bianchi, ‘Human Rights and the Magic of Jus Cogens’ (n 19) 493; Ulf Linderfalk, ‘The Source of Jus Cogens Obligations – How Legal Positivism Copes with Peremptory International Law’ (2013) 82 Nordic Journal of International Law 369, 370; Gennady M Danilenko, ‘International Jus Cogens: Issues of Law-Making’ (1991) 2 European Journal of International Law 42, 43.

⁴⁰ See, for example, the lists of possible and putative *ius cogens* norms and the sources cited in support of those lists in Malcolm Shaw, *International Law* (7th edn, Cambridge University Press 2014) 89–91; M Cherif Bassiouni, ‘International Crimes: Jus Cogens and Obligatio Erga Omnes’ (1996) 59 Law and Contemporary Problems 63, 68.

⁴¹ Leaving aside D’Amato’s heavy sarcasm, his criticism that Courts (and others) rarely ‘give the reader the slightest clue as to how they came to know that their favorite norms have become *jus cogens* norms’ is fair. Anthony D’Amato, ‘It’s a Bird, It’s a Plane, It’s Jus Cogens!’ (1990) 6 Connecticut Journal of International Law 1, 3; Martin Dixon, *Textbook on International Law* (7th edn, Oxford University Press 2013) 42. However, see *contra* Ford, who argues that it is appropriate that the primary means of determining *ius cogens* rules should be decisions on the subject by the ICJ: Ford (n 12) 168 *et seq.*

⁴² Bianchi, ‘Human Rights and the Magic of Jus Cogens’ (n 19) 494; see also D’Amato (n 41); Alfred P Rubin, ‘Actio Popularis, Jus Cogens and Offences Erga Omnes?’ (2001) 35 New England Law Review 265. Simma and Aston discuss the difficulties of identifying peremptory norms, noting that ‘rules of *jus cogens* are prohibitive in structure; they are rules of abstention. How does one marshal conclusive evidence of abstentions? Abstentions *per se* mean nothing; they become meaningful only when considered in the light of the intention motivating them’: Bruno Simma and Philip Alston, ‘The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles’ (1988–89) 12 Australian Yearbook of International Law 82, 103–04.

and commentators that, even if it is not indisputable, their status as such is at least rarely disputed. This chapter will treat the *ius cogens* status of certain norms as established:⁴³ the prohibitions on aggressive force,⁴⁴ genocide,⁴⁵ slavery,⁴⁶ torture,⁴⁷ war crimes,⁴⁸ crimes against humanity,⁴⁹ and apartheid.⁵⁰ The status of two further groups of norms, though,

⁴³ Shaw (n 40) 89–91; Jan Klabbers, *International Law* (Cambridge University Press 2013) 24; Antonio Cassese, *International Law* (2nd edn, Oxford University Press 2005) 202; James Crawford, *Brownlie's Principles of Public International Law* (8th edn, Oxford University Press 2012) 595; Hannikainen (n 5) 717–23; Bassiouni (n 40) 68; Marjorie M Whiteman, 'Jus Cogens in International Law, with a Projected List' (1977) 7 *Georgia Journal of International and Comparative Law* 609, 625–26; Grigory I Tunkin, 'Jus Cogens in Contemporary International Law' (1971) 3 *University of Toledo Law Review* 107, 117; Yarwood (n 13) 31–34; International Law Commission, 'Draft Articles on the Law of Treaties with Commentaries' *Yearbook of the International Law Commission* (1966, vol.II), Article 50, [3].

⁴⁴ See *ibid.*, and further: Koskeniemi (n 18) [374]; Klabbers (n 43) 24; Whiteman (n 43) 625–26; Hannikainen (n 5) 323–56.

⁴⁵ See above (n 43), and further: Separate Opinion of Judge *ad hoc* Lauterpacht, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Provisional Measures, Order of 8 April 1993, (1993) ICJ Reports 407, [100–104]; *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of Congo v Rwanda)*, Jurisdiction and Admissibility, Judgment, (2006) ICJ Reports 6, [64]; *Prosecutor v Kambanda* (Case No. ICTR-97-23-S), Judgment and Sentence, 4 September 1998, [16]; Bianchi, 'Individual Accountability for Crimes Against Humanity: Reckoning with the Past, Thinking of the Future' (n 10) 116.

⁴⁶ See above (n 43), and further: Slavery Convention, signed 25 September 1926, in force 9 March 1927, Article 2(a-b); Jochen A Frowein, 'Ius Cogens', *Max Planck Encyclopaedia of Public International Law* (Max Planck Society/Oxford University Press 2013) [C.6]; Bianchi, 'Individual Accountability for Crimes Against Humanity: Reckoning with the Past, Thinking of the Future' (n 10) 116; David Weissbrodt and Michael Dottridge, *Abolishing Slavery and its Contemporary Forms*, Office of the United Nations Commissioner for Human Rights, 2002, UN Doc HR/PUB/02/4, [6]; Stefan Kirchner and Vanessa M Frese, 'Slavery under the European Convention on Human Rights and the Jus Cogens Prohibition of Human Trafficking' (2015) 27 *Denning Law Journal* 130, 132–33.

⁴⁷ See above (n 43), and further: *Questions Relating to the Obligation to Prosecute or Extradite (Bengium v Senegal)*, Judgment, (2012) ICJ Reports 422, [99]; *Furundžija v Prosecutor*, Judgment of the Trial Chamber, 10 December 1998, Case No. IT-95-17/1-T, [144, 147–157]; *R. v Bow Street Metropolitan Stipendiary Magistrate Ex Parte Pinochet Ugarte (no. 3)*, [2001] 1 AC 147; [1999] 2 WLR 827, 198; *Georgopoulos v Greece*, HRC Communication, 14 September 2010, UN Doc. CCPR/C/99/D/1799/2008, [5]; Erika de Wet, 'The Prohibition of Torture as a Norm of Jus Cogens and Its Implications for National and Customary Law' (2004) 15 *European Journal of International Law* 97; Bianchi, 'Individual Accountability for Crimes Against Humanity: Reckoning with the Past, Thinking of the Future' (n 10) 116.

⁴⁸ See above (n 5), and further: *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening)*, Judgment, (2012) ICJ Reports 99, [95], citing *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium)*, Judgment, (2002) ICJ Reports 3, [56 et seq.]. There the Court held that its references to war crimes and crimes against humanity in the *Arrest Warrant* case were to rules which 'undoubtedly possess the character of *jus cogens*'. See also discussion of the background to the case in Andrea Bianchi, 'Serious Violations of Human Rights and Foreign States' Accountability before Municipal Courts' in Lal Chand Vohrah and others (eds), *Man's Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese* (Kluwer Law International 2003).

⁴⁹ *ibid.*

⁵⁰ See above (n 43), and further: International Convention on the Suppression and Punishment of the Crime of Apartheid, signed 30 November 1973, in force 18 July 1976, 1015 UNTS 243; Oren Ben-Dor, 'The One-State

requires further examination. In the first category there are certain norms which, although there is no consensus as yet, are mentioned by some accounts—notably the prohibitions on ethnic cleansing⁵¹ and enforced disappearances⁵²—and which will be argued to have a credible claim to peremptory status. The second category contains norms which, it will be argued, are incorrectly categorised as having *ius cogens* status: the rule *pacta sunt servanda*,⁵³ and the prohibition of piracy.⁵⁴

This section will briefly consider these proposed norms *ius cogens*, and section 4 will then argue that each of the norms correctly categorised as having *ius cogens* status also have a powerful relationship to the protection of self-determination.⁵⁵ Finally, section 5 will consider whether the relationship is causal or casual. It will use as a test case poverty—arguably the single greatest threat to meaningful individual and collective self-determination—and will

as a Demand of International Law: Jus Cogens, Challenging Apartheid and the Legal Validity of Israel' (2013) 12 Holy Land Studies 181, 196.

⁵¹ Robin Geiß, 'Ethnic Cleansing', *Max Planck Encyclopaedia of Public International Law* (Max Planck Society/Oxford University Press 2013).

⁵² Antônio Augusto Cançado Trindade, 'Enforced Disappearances of Persons as a Violation of Jus Cogens: The Contribution of the Jurisprudence of the Inter-American Court of Human Rights' (2012) 81 *Nordic Journal of International Law* 507; Sarkin (n 2); Criddle and Fox-Decent (n 19) 396–370; Hannikainen (n 5) 511.

⁵³ W Paul Gormley, 'The Codification of Pacta Sunt Servanda by the International Law Commission: The Preservation of Classical Norms of Moral Force and Good Faith' (1969–70) 14 *St Louis University Law Journal* 367, 386; Mark Weston Janis, 'The Nature of Jus Cogens' (1978–88) 3 *Connecticut Journal of International Law* 359, 362; Mark Weston Janis, 'The Nature of Jus Cogens' in Larry May and Jeff Brown (eds), *Philosophy of Law: Classic and Contemporary Readings* (John Wiley & Sons 2009) 186; James Crawford, *The Creation of States in International Law* (2nd edn, Clarendon Press 2006) 99–100; see below, p.256–257.

⁵⁴ Manfred Lachs, 'The Development and General Trends of International Law in Our Time' (1980) 169 *Collected Courses of the Hague Academy of International Law* 9, 206; Jiménez de Aréchaga (n 8) 64; Bassiouni (n 40) 68; Whiteman (n 43) 625; Hannikainen (n 5) 67–75, 541–43.; ILC, 'Draft Articles on the Law of Treaties' (n 43) Article 50 [3]; see below, p.258–260.

⁵⁵ This correlation has also been observed, albeit in slightly different terms, by Bianchi, who comments rhetorically that '[i]t is as if human rights were a quintessential part of *jus cogens*.' Bianchi, 'Human Rights and the Magic of Jus Cogens' (n 19) 495.

conclude that poverty's close connection to the protection of self-determination is insufficient to produce an *ius cogens* norm.

3.1 Ethnic Cleansing

In its judgment in the *Genocide Convention (Bosnia and Herzegovina v Serbia and Montenegro)* case, the ICJ held that ethnic cleansing means 'rendering an area ethnically homogenous by using force or intimidation to remove persons of given groups from the area'.⁵⁶ Although the Court made no finding on the status of the norm (either in that case or subsequently), there are a number of indications that ethnic cleansing is prohibited, and that it is so regardless of circumstances. The Commission of Experts declared the existence of the prohibition in their First Interim Report,⁵⁷ and the practice has been universally condemned, not least by the UN General Assembly,⁵⁸ the Vienna World Conference on Human Rights,⁵⁹ and the Security Council.⁶⁰ Indeed, During the Security Council debate on resolution 941 (adopted unanimously), the representatives of the States Members of the Council condemned ethnic cleansing in strong and absolute terms.⁶¹ This was the case, for example, in the statement made by the representative of Germany, who referred to ethnic cleansing as 'abhorrent',⁶² and similar statements were made by the representatives of the Czech

⁵⁶ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment, (2007) ICJ Reports 43, [190]; citing Interim Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), UN Doc. S/25274, [55].

⁵⁷ Interim Report (n 56) [55].

⁵⁸ See, e.g. UNGA Res 47/80 (1992).

⁵⁹ Vienna Declaration and Programme of Action, Adopted by the World Conference on Human Rights in Vienna, 25 June 1993, [I.28, II.23-24].

⁶⁰ UNSC Res 941 (1994).

⁶¹ Security Council, Official Record of the 3428th Meeting, 23 September 1994, UN Doc. S/PV.3428.

⁶² *ibid* 11.

Republic,⁶³ Argentina,⁶⁴ the United Kingdom,⁶⁵ the United States,⁶⁶ New Zealand,⁶⁷ and Russia, who demanded the ‘immediate cessation’ of the ‘repugnant’ practice of ethnic cleansing, which he regarded as a ‘gross, heinous violation[]’.⁶⁸ If the prohibition on ethnic cleansing has not yet emerged as a norm *ius cogens*, then, it would appear to be a prime candidate for recognition as such.

3.2 Enforced Disappearances

Like the prohibition on ethnic cleansing, the prohibition on enforced disappearances does not typically feature among the norms enumerated as possessing *ius cogens* status. In recent years, however, a number of academic commentators and certain international institutions have suggested that the prohibition on enforced or involuntary disappearances is a norm *ius cogens*. Cançado Trindade argues that the IACtHR has recognised enforced disappearances as a prohibition *ius cogens*, and that its status as such should be more generally acknowledged.⁶⁹ In particular, he refers to the IACtHR’s innovative approach in treating the next of kin of the disappeared as victims of the offence on par with the disappeared individual themselves as having expanded the scope of the Court’s investigations of allegations of disappearances, and its ability to hold States to account for what has (rightly) been regarded as a very serious denial of human rights and human dignity.⁷⁰ However, it is clear that the IACtHR considered that enforced disappearances are a prohibition of *ius cogens* status as a sub-set of a larger, and

⁶³ *ibid* 24-25.

⁶⁴ *ibid* 29.

⁶⁵ *ibid* 32.

⁶⁶ *ibid* 34.

⁶⁷ *ibid* 36.

⁶⁸ *ibid* 30.

⁶⁹ Cançado Trindade (n 52).

⁷⁰ *ibid* 510.

more controversial, purported norm *ius cogens*—the prohibition of *grave violations of human rights*—and not as a norm in itself.⁷¹

Sarkin also argues that enforced disappearances have attained the status of *ius cogens* prohibitions. He cites a number of factors in support of his contention, notably that the prohibition is indicated by its absolute prohibition in a number of international instruments; the common practice of excluding enforced disappearances from amnesty laws; the character of enforced disappearances as a denial of the application of law to the individual; and that no State argues that it has the right to conduct disappearances, coupled with near universal condemnation of the practice.⁷² While no element is in itself probative, Sarkin demonstrates that each of the elements he identifies as indicative is favourable to a finding of *ius cogens* status. Perhaps most convincing, Sarkin identifies that ‘it is unheard of for a state to claim that they have the right to commit enforced disappearances’,⁷³ and ‘no countries have laws that permit enforce disappearances to occur, at least in theory.’⁷⁴ Similarly, the UN General Assembly’s Declaration on the Protection of All Persons from Enforced Disappearances—which included the injunction that ‘[n]o State shall practice, permit or tolerate enforced disappearances’⁷⁵—was passed by consensus, as was its resolution 61/177 which adopted the International Convention for the Protection of All Persons from Enforced Disappearances and

⁷¹ *ibid.*

⁷² Sarkin (n 2).

⁷³ *ibid* 570.

⁷⁴ *ibid* 571.

⁷⁵ Declaration on Enforced Disappearances, UNGA Res 47/133 (1993), Article 2(1).

opened it for signature.⁷⁶ It seems to be at least arguable, therefore, that the prohibition on enforced disappearances has attained *ius cogens* status.

3.3 *Pacta Sunt Servanda*

The rule *pacta sunt servanda* is commonly claimed to be a norm *ius cogens*.⁷⁷ Such a claim, however, misunderstands the nature of both the norm, and the concept of peremptory normativity. There is no doubt that *pacta sunt servanda* is an essential component of international law, but there are two reasons why it should not be regarded as having *ius cogens* character.

First, *pacta sunt servanda* is not an absolute norm from which no derogation is permitted. The ILC's Articles on State Responsibility note a number of 'circumstances precluding wrongfulness' or, in other words, conditions under which a State may acceptably fail to fulfil its obligations.⁷⁸ These are consent, self-defence, countermeasures, *force majeure*, distress, necessity and compliance with a peremptory norm.⁷⁹ Similarly, that it is not absolute may be indicated by the circumstances, listed in Articles 61 and 62 of the VCLT (such as supervening impossibility of performance and fundamental change of circumstances), in which it is acceptable for a State unilaterally to terminate its treaty relationships.⁸⁰ The point is not probative, however, and it would be possible to cast these as exceptions to the rule rather than

⁷⁶ UNGA Res 61/177 (2006); International Convention for the Protection of All Persons from Enforced Disappearance, signed 20 December 2006, in force 23 December 2010, 2716 UNTS 3.

⁷⁷ See, e.g. Gormley (n 53); Janis, 'The Nature of Jus Cogens' (n 53) 362; Janis, 'The Nature of Jus Cogens' (n 53) 186; Crawford (n 53) 99–100.

⁷⁸ International Law Commission, 'Draft Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries' *Yearbook of the International Law Commission* (2001, vol.II), Chapter V.

⁷⁹ *ibid* Article 20–26.

⁸⁰ Vienna Convention (n 6) Article 61–62; Hugh Thirlway, *The Sources of International Law* (Oxford University Press 2014) 32.

derogations from it. Nevertheless, and despite the importance of the idea to the international legal system, these factors tend to cast doubt on the peremptory status of the norm.

It may be that some resolution to this apparent conflict is offered by the second factor, that of the proper characterisation of the rule *pacta sunt servanda*. This idea—or its close counterpart of obligation to law—was discussed in chapter three, where it was characterised as a *structural property* of the international legal system which, like sovereignty, statehood and *ius cogens* itself,⁸¹ is derived from the structural principle of self-determination.⁸² Rather than being a substantive rule of law to which the idea of peremptory normativity would apply, therefore, *pacta sunt servanda* would be more appropriately categorised as one of the second-order concepts of the international legal system – a concept on the same plane as the *ius cogens* idea, and more basic than that of individual *ius cogens* norms. It would, therefore, not only be ideationally anachronistic to characterise *pacta sunt servanda* as *ius cogens*, it would also be unnecessary: as has been argued above, the idea of obligation is derived from the self-determination of communities of individuals, and is thus embedded in the legal order. As Orakashvili comments; the norm does ‘not need to be qualified as peremptory in order to fulfil [its] functions’.⁸³

Taken together, these observations indicate that there are reasons to be sceptical of the claim that *pacta sunt servanda* is a peremptory norm.

⁸¹ See above, p.248-249.

⁸² See above, p.180-182, and further, Introduction at p.23-25.

⁸³ Orakhashvili (n 9) 45.

3.4 Piracy

Piracy is sometimes said to be a prohibition *ius cogens* – indeed, it is often considered to be a very early example of a norm of such character.⁸⁴ In this contention there is, however, an unwarranted conflation between norms *ius cogens* and norms of international criminal law. Certainly piracy may be regarded as the first international crime, and perhaps the first example of universal jurisdiction.⁸⁵ Nevertheless, there are good reasons for doubting that the prohibition is a norm *ius cogens*, primarily related to the question of who *ius cogens* norms bind. Piracy is an individual act, and one that is incapable of being committed by a State. This makes it unsuitable for recognition as a norm of *ius cogens* status.

First, that piracy is an individual act incapable of being committed by a State may be seen in the historical distinction between piracy and privateering. In the years before the Paris Declaration of 1856 it was generally accepted that a privateer—an individual under the commission of a Government and bearing a letter of marque—acted lawfully in the taking of ships at sea, falling within the right of the State so to do.⁸⁶ Thus although it was not always clear in practice whether an individual was pirate or privateer,⁸⁷ a clear divide was drawn between the two actions as a matter of law.⁸⁸ In modern international law, by contrast, both actions would be seen as illegal. Nevertheless, the distinction between piracy—as the action

⁸⁴ Hannikainen (n 5) 67–75.

⁸⁵ Separate Opinion of President Guillaume, *Arrest Warrant (Belgium v Democratic Republic of Congo)*, Judgment (2002) ICJ Reports 35, [5]; Joint Separate Opinion of Judges Higgins, Koijmans and Buergenthal, *Arrest Warrant (Belgium v Democratic Republic of Congo)*, Judgment (2002) ICJ Reports 63, [61]; Kenneth C Randall, ‘Universal Jurisdiction under International Law’ (1987–88) 66 Texas Law Review 785, 791.

⁸⁶ Declaration Respecting Maritime Law (Paris Declaration), concluded 30 March 1856; see Henry Jones, ‘Lines in the Ocean: Thinking with the Sea about Territory and International Law’ (2016) 4 London Review of International Law 307, 328–33; Lauren Benton and Lisa Ford, *Rage for Order: The British Empire and the Origins of International Law 1800–1850* (Harvard University Press 2016) 117–22, 134; Hannikainen (n 5) 69–72.

⁸⁷ Jones (n 86) 330–31; Lauren Benton, *A Search for Sovereignty* (Cambridge University Press 2010) 112; Benton and Ford (n 86) 135–37.

⁸⁸ Jones (n 86) 332; Paris Declaration (n 86).

of an individual⁸⁹—and equivalent State conduct is still meaningful. In modern legal terms, an attack upon a vessel at sea by a ship and crew whose actions are attributable to a State would be best considered not as an act of piracy, but rather as an illegal use of force and an illegal act of aggression against the flag State. Given that aggression is already an *ius cogens* prohibition under international law, it would be superfluous to recognise a separate norm forbidding States to attack ships on the high seas.

Nor, it is submitted, would it be possible for individuals or other non-State actors to be subject to a prohibition on piracy *qua* a prohibition *ius cogens*.⁹⁰ *Ius cogens* norms are defined in international law primarily by their character as norms out of which States cannot contract.⁹¹ To the extent, therefore, that they represent substantive rules of international law they may bind individuals, non-State actors and others, but in their capacity as norms *ius cogens* their distinctive feature—that any agreement which conflicts with them is void—can apply only to those entities which can make international law.⁹² Of course, that a procedural obligation prohibiting the derogation from a norm exists implies, at the very least, the existence of the equivalent norm,⁹³ and it may be said therefore that this point represents an unduly fine

⁸⁹ UNCLOS defines piracy as an action ‘committed for private ends’: United Nations Convention on the Law of the Sea, signed 10 December 1982, in force 16 November 1994, 1833 UNTS 3, Article 101(a).

⁹⁰ This statement is admittedly controversial. It directly conflicts with the Opinion of the ICJ in the Advisory Proceedings on the *Accordance with International Law of the Declaration of Independence in Respect of Kosovo* (2010) ICJ Reports 403 [81]; see also discussion above, p.113-131. A number of authors also conclude that *ius cogens* norms are capable of binding individuals. Peters, for example, notes that ‘[b]ecause *jus cogens* applies unconditionally, it also binds non-State actors such as individual and collective actors, including armed groups and business enterprises.’ See Anne Peters, *Beyond Human Rights: The Legal Status of the Individual in International Law* (Jonathan Huston tr, Cambridge University Press 2016) 101. [Footnotes omitted].

⁹¹ See Human Rights Committee, General Comment 29, UN Doc no. CCPR/C/21/Rev.1/Add.11, [11]; Theo van Boven, ‘Categories of Rights’ in Daniel Moeckli and others (eds), *International Human Rights Law* (Oxford University Press 2010) 182.

⁹² See Orakhelashvili (n 9) 9–11, 67–82 *et seq*; see also Jordan Paust, ‘The Reality of Jus Cogens’ (1991) 7 Connecticut Journal of International Law 81, 83–84.

⁹³ Hannikainen (n 5) 6; Linderfalk, ‘The Source of Jus Cogens Obligations – How Legal Positivism Copes with Peremptory International Law’ (n 39) 374–75; Ford (n 12) 153–54; Giorgio Gaja, ‘Jus Cogens Beyond the Vienna Convention’ (1981) 172 Collected Courses of the Hague Academy of International Law 271, 288–89.

distinction between the substance of a prohibition and its status.⁹⁴ As Bianchi argues, ‘the river bank of the law of treaties having been carried away by the force of the flood, *jus cogens* has inundated the plain of international law’: if *ius cogens* norms ever were confined in their application to the law of treaties, it would now be difficult to maintain that they remain so limited in scope.⁹⁵ Nevertheless, it is submitted that there is a relevant difference in kind between the actions of a State and the actions of individuals, non-State groups and other actors: the actions of States directly shape the contours of international legality. For a non-State actor or an individual, then, save for a purely rhetorical effect,⁹⁶ that an action is subject to a prohibition *ius cogens* means at most that States could not contract to render the action legal for that individual or group to perform.⁹⁷ That a prohibition exists *ius cogens* does not make it *more* illegal for an individual to breach.⁹⁸ In light of this conclusion, and given that Piracy is not an action of States, it seems highly unlikely that Piracy is a norm of *ius cogens* character.

4. Norms *Ius Cogens* and Self-Determination

For the purpose of this analysis it will be presumed that the norms international law recognised as having *ius cogens* character are the prohibitions on aggression, genocide, crimes against humanity, war crimes, torture, slavery, apartheid, ethnic cleansing, and enforced disappearances. Although the lack of a robust criteria for the identification of peremptory norms means that it is challenging to arrive at such a conclusion with confidence—it may be

⁹⁴ See, *contra*, Markus Petsche, ‘Jus Cogens as a Vision of the International Legal Order’ (2010) 29 Penn State International Law Review 233, 238, 249–57; Alfred Verdross, ‘Jus Dispositivum and Jus Cogens in International Law’ (1966) 60 American Journal of International Law 55.

⁹⁵ Bianchi, ‘Human Rights and the Magic of Jus Cogens’ (n 19) 496.

⁹⁶ *ibid.*

⁹⁷ Paust (n 92) 83–84.

⁹⁸ Linderfalk’s disaggregation of norms *ius cogens* into first and second order norms supports this contention: Linderfalk, ‘The Source of Jus Cogens Obligations – How Legal Positivism Copes with Peremptory International Law’ (n 39) 377.

argued both that this list is under- and over-inclusive—a convincing case can be made in favour of the inclusion of each of these provisions.

This section will argue that the peremptory status of these prohibitions is not, though, their only point of commonality. Rather, each is concerned with the protection of individuals and communities from certain extreme actions of States and, or so it will be argued, it is the protection of individual or collective self-determination that is central in each case. This section will examine the connection between the norms *ius cogens* given above and self-determination under the headings of those norms which protect individual self-determination, those which protect political self-determination, and those which have relevance to both forms. Significantly, it will conclude that each prohibition has the same ultimate aim—the protection and the realisation of the dignity of the individual human person—and this conclusion, taken together with the characterisation given above of the category *ius cogens* as a corollary of the root of obligation in self-determination, strongly suggests a role for self-determination in the identification and creation of norms *ius cogens*. That conclusion will then be further examined in section 5, where it will be tested against a hypothetical norm against poverty.

4.1 Individual Self-Determination

Personal self-determination was defined above as the contention that all individual human agents should have the opportunity to decide upon and to pursue their individual conception of the good.⁹⁹ Put more prosaically, individuals claim for themselves a certain level of freedom and well-being, such that they can make choices concerning their own lives.¹⁰⁰ That

⁹⁹ See above, p.8-9.

¹⁰⁰ In Korsgaard's terms, they make choices in accordance with their *practical identities*: Christine M Korsgaard, *The Sources of Normativity* (Onora O'Neill ed, Cambridge University Press 1996) 136 et seq.; see also Christine

principle—often treated as a premise in liberal politico-legal theory¹⁰¹—was characterised here as a social claim that is made meaningful by the presence of the individual in society, but which is also imperilled as a result. Social regulation—the existence of law and of socio-political institutions—was therefore posited as a necessary corollary of individual self-determination, offering the individual protection against the actions of others.¹⁰²

As history has amply demonstrated, however, the establishment of political power over individuals and societies rarely produces the egalitarian, utopian *Rechtstaat* envisioned by theory. On the contrary, the concentration of authority and power in the hands of individuals or groups creates a new kind of threat to the self-determination of the individual, and one of extraordinary gravity. One need not resort to Baron Acton's truism that '[p]ower tends to corrupt and absolute power corrupts absolutely. Great men are almost always bad men' to arrive at this conclusion;¹⁰³ it is sufficient to note that, should such a situational actualise, the vast imbalance between the institutionalised power of the State and the human person renders the individual uniquely vulnerable. There is, therefore, an imperative to constrain the power of the State to impede or destroy the self-determination of the individual, and it was argued above that such a limit is implied by the characterisation of the State given in this thesis as a product of the aggregated self-determination of the individuals who comprise it.¹⁰⁴ That contention is supported by the manifestation of the protection of individual self-determination

M Korsgaard, *The Constitution of Agency: Essays on Practical Reason and Moral Psychology* (Oxford University Press 2008).

¹⁰¹ See e.g. Ronald Dworkin, *Taking Rights Seriously* (Gerald Duckworth & Co Ltd 2005) 272–73; Robert Nozick, *Anarchy, State and Utopia* (Basil Blackwell 1974) ix; Joseph Raz, 'The Rule of Law and Its Virtue' in *The Authority of Law: Essays on Law and Morality* (Clarendon Press 1979) 220.

¹⁰² See above, p.9-11, 180-182.

¹⁰³ Letter from John Emerich Edward Dalberg-Acton, 'Letter to Archbishop Mandell Creighton' (5 April 1887).

¹⁰⁴ See above, p.9-11, 180-182, 224-227.

in a number of norms *ius cogens*, most particularly the prohibitions on torture, slavery, enforced disappearances and apartheid.

The denial of self-determination is, first, an intrinsic part of the definition of an act of torture. Torture differs from other instances of the infliction of pain on one person by another because it is *purposive*. The infliction of physical or mental suffering becomes an act of torture when it is done for the purpose of punishment, intimidation, coercion, or the extraction of information.¹⁰⁵ In other words, suffering becomes torture when it is designed to substitute the will of the individual concerned for that of the torturer. By means of the pain and suffering inflicted the torturer forces the individual to reveal information, to make a confession, or to shape their future conduct, and in so doing it reduces the person to the status of an object, ‘negates her autonomy, and deprives her of human dignity.’¹⁰⁶ The link is inescapable, and significant: the repugnant act of intentionally causing the severe suffering of a person becomes the act subject to a universal and non-derogable prohibition under international law when it is committed for the purpose of subjugating the individual’s self-determination.

There can, similarly, be no doubt whatsoever of the link between the prohibition on slavery and self-determination. Like torture, the essence of slavery is the subjugation of the will of one individual to another, and it necessarily entails a de-humanisation of the individual in which personhood is destroyed to make way for objectifiable property. Similar, too, is the prohibition of enforced disappearance. Although the means differ, here too the effect and intention is to entirely subsume the individual will and prevent any manifestation of individual identity, rights, direction or determination. As McDermot puts it: enforced disappearance is

¹⁰⁵ Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, signed 10 December 1984, in force 26 June 1987, Article 1(1).

¹⁰⁶ Oren Gross, ‘Are Torture Warrants Warranted - Pragmatic Absolutism and Official Disobedience’ (2004) 88 Minnesota Law Review 1481, 1492.

‘the negation of the right of a human being to exist, to have an identity. Forced disappearance transforms the being into a non-being.’¹⁰⁷ ‘States that engage in these practices’, Christiano says, ‘cannot be said to be representing the interests of their members’; a factor which he argues defeats the voluntary association of individuals to the State.¹⁰⁸ Recast to accord with the vocabulary of this thesis, it can be argued that States which permit, facilitate or carry out such extreme denials of self-determination negate their own foundations, and forfeit their legitimate authority over the individuals within their borders.

These individual threats to self-determination, and particularly torture and enforced disappearances, also imply a collective effect. Used to defeat the self-determination of the individual, the use of torture and enforced disappearance to suppress dissenting voices has a chilling effect on the self-determination of individuals and groups in a State, preventing the social and political realisation of individuals and entrenching power imbalances between individuals and populations. This dual individual and collective character is seen even to a greater extent in the prohibition on apartheid. Systematic racial discrimination of this kind profoundly compromises the self-determination of individuals in the relevant groups, reducing their living conditions and life chances, and restricting or removing their ability to participate in the governance of the State. Its individual consequences cannot be disentangled from its collective effects, though: apartheid is an attack on a community defined by race, and entails a subjugation of the rights and will of that community to the will of another, removing from those individuals their political self-determination right to take part, on conditions of equality with others, in the choice of the political and social structures and norms which govern their shared social life. An equally pernicious effect straddles the two kinds, in that apartheid prevents the individual from determining their own identity. Instead, the individual is defined

¹⁰⁷ Niall McDermot, *International Commission of Jurists Review*, 2001, 73.

¹⁰⁸ Thomas Christiano, ‘Democratic Legitimacy and International Institutions’ in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (Oxford University Press 2010) 124.

by their race, the racial group is required by the system to understand itself as a collective, and a collective identity is thus imposed from outside rather than being generated from within the community as a result of the self-determination of its members.

4.2 Collective Self-Determination

In parallel to those peremptory prohibitions which protect individual self-determination, a number of the norms recognised by international law as *ius cogens* have a close connection to collective expressions of self-determination, in particular the political form.

The political form of self-determination was defined above as a manifestation of the aggregated self-determination rights of the individuals in a particular society, and it was argued that it stands for two propositions. In its internal aspect, sometimes referred to as popular sovereignty, political self-determination acknowledges individuals as the source of legitimacy in a political constitution, and requires that the individuals who compose a society determine the forms and structures according to which it is governed. In its external aspect it stands for the principle of non-interference, or the contention that the choice of those forms and structures is an act of self-determination by the members of a society, and that the imposition of a different choice from outwith the society therefore severs the link between the society and the self-determination of its members.¹⁰⁹ It was argued in Part 1 that this principle has become deeply embedded in the international legal order;¹¹⁰ and the need to protect political self-determination can be seen in the *ius cogens* prohibitions on aggression, genocide, ethnic cleansing, crimes against humanity and war crimes.

¹⁰⁹ See above, p.9-11.

¹¹⁰ See above, p.138-139.

The prohibition on aggression is the clearest example of the protection of the external facet of political self-determination. The prohibition on any international use of force that is not either self-defensive or authorised by the UN Security Council stems from the UN Charter. In order, it said, ‘to save succeeding generations from the scourge of war’,¹¹¹ ‘[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state’.¹¹² As argued above, that provision—already of huge significance in itself—was notable, too, because it mirrored the Article 1(2) proclamation of ‘the principle of equal rights and self-determination of peoples’.¹¹³ It was argued that the prohibition safeguards the integrity of national (political) self-determination and protects the national “self” against this most extreme form of external interference, in which the collective will of the State is forcibly suppressed.¹¹⁴

Genocide and ethnic cleansing, too, have strong links to self-determination, although here it is the internal form of political self-determination that is primarily engaged. As the Court observed in the *Reservations* case, genocide is a crime against “communities”, “peoples”, or “selves”:

The origins of the Convention show that it was the intention of the United Nations to condemn and punish genocide as “a crime under international law” involving a *denial of the right of existence of entire human groups*.¹¹⁵

A group persecuted to the point of extinction (whether through mass killings or the many indirect methods recognised as capable of amounting to the act) is the most profound and extreme method of preventing the self-determination of the group. That “genocide” rather

¹¹¹ Charter of the United Nations, signed 26 June 1945, in force 24 October 1945, preamble.

¹¹² *ibid.* Article 2(4).

¹¹³ *ibid.* Article 1(2).

¹¹⁴ See above, p.76-81; *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)*, Merits, Judgment, (1986) ICJ Reports 14, [205].

¹¹⁵ *Reservations to the Convention on Genocide*, Advisory Opinion, (1951) ICJ Reports 15, 23.

than “mass-killings” is recognised as the *ius cogens* prohibition is significant: it suggests that the crime of genocide is seen as being qualitatively different—perhaps more serious—than “mere” mass killings. The differentiating factor is that while mass killings and genocide both involve the slaughter of many people, genocide involves also an attempt to destroy “the People” (the Self) as well as the individuals. It is this purposive element, this direct assault upon the Self, that results in the “crime of crimes”.¹¹⁶ The same assault on the self is a prerequisite for ethnic cleansing, which involves the removal of a population identifiable through a distinct group identity and through objective factors (race, religion, ethnicity, history, custom, language, etc.) from a territory. Insofar as that group constitutes a “self” forcible or coercive measures to remove it from its home not only interfere with the direct application of its self-determination, but are likely to lead to disruptions in its ability to function as a self at all.

In parallel to the observation above that threats to individual self-determination also imply collective effects, it is self-evident that the threats to political self-determination discussed here can also entail devastating consequences for the individual. Like apartheid, however, the category of crimes against humanity is one which straddles the border between collective and individual self-determination. These are mass crimes committed against population groups (in particular the crime of persecution), and thus link to collective self-determination. However, there is also a clear link to individual self-determination: although the *campaign* against the civilian population must be ‘widespread’ or ‘systematic’ for an act to amount to a crime against humanity, the individual *act* (murder, rape, etc.) need not be of a kind with the other acts which comprise the campaign. Rather, a single act of murder (or rape, kidnapping,

¹¹⁶ This phrase is often attributed to Raphael Lemkin: Raphael Lemkin, ‘Broadcast on Genocide’ (23 December 1947). It was also used to refer to genocide by the International Criminal Tribunal for Rwanda in imposing its first sentence: *Prosecutor v Kambanda* (Case No. ICTR-97-23-S), Judgment and Sentence, 4 September 1998, [16].

and so on) is capable of amounting to a crime against humanity, where it is conducted as a contributory part of a campaign against a population.

The scope of the prohibition on war crimes is similar, although here the relationship with self-determination is more complex. This is a portmanteau provision whereby any one of a large number of acts may amount to a war crime where they are committed on a 'large scale' against 'protected persons'.¹¹⁷ Many of these acts have a self-evident connection to the protection of the self-determination and dignity of individuals and groups, but the category also includes a number of acts where the connection to self-determination is more ambiguous, or which do not have a clear connection to the principle. For example, although there is a clear connection to self-determination in the prohibition of the targeting of hospitals, scorched earth tactics, rape, and the use of indiscriminate weaponry; and a connection to the protection of individuals in a position of unusual vulnerability can be seen, too, in the provisions which mandate a minimum standard of treatment of prisoners of war; the prohibitions on the improper use of a flag of truce, and the improper use of the insignia of the enemy, the UN or the Red Cross do not appear to have a meaningful connection to the protection of self-determination. Nevertheless, a connection to self-determination can be observed in the majority of the acts which fall under the heading of war crimes, and it is submitted that the lack of a connection to self-determination of a limited number of provisions (some of which are primarily of historical interest) should not therefore be taken to deny the connection of the category as a whole. The centre of gravity of the category lies in the protection of civilians and other particularly vulnerable groups from the worst effects in times of war, and as such seeks to protect the dignity of the individual and of individuals in populations.

¹¹⁷ Rome Statute of the International Criminal Court, circulated as document A/CONF.183/9 of 17 July 1998 and corrected by process-verbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002, in force 1 July 2002, Article 8(2).

4.3 Conclusion

This section has examined the connection between norms *ius cogens* and self-determination. It was theorised that, following the conclusion of Section 2 that *ius cogens* is a concept which arises as a necessary corollary of the foundation of the State and of international obligation in self-determination, a connection to the protection of self-determination would be discernible in the substantive norms of *ius cogens*. An examination of the norms substantiated that claim, and it was found that each of the norms taken here to be of *ius cogens* status was characterised also by a deep and necessary connection to the protection of individual or group self-determination – the forms here referred to as personal and political self-determination. It is this which, it is submitted, is the ‘widely shared moral intuition’ of the international society which ‘sanctions [the] social authority and evocative power’ of *ius cogens* norms.¹¹⁸ It is not yet clear, however, whether this link is causal (or, in other words, whether the link with self-determination has as its corollary *ius cogens* status); contributory (whether the link with self-determination contributes to the formation of an *ius cogens* norm); or is merely incidental. In the third section, this relationship will be examined further. There the possibility of an *ius cogens* norm of poverty will be discussed. As will be argued, few ills have a more destructive effect on self-determination than poverty, and no legal order can truly claim to protect self-determination while tolerating the poverty of individuals within it. If, therefore, the link between self-determination and *ius cogens* is causal or contributory, poverty should be revealed as either a norm *ius cogens de lege lata*, or as an emerging norm *de lege ferenda* which is a prime candidate for recognition as a peremptory norm of international law.

5. *Ius Cogens* as Self-Determination? Testing the Connection

It was argued above that the norms recognised as *ius cogens* each have a connection to self-determination, and that in most cases that connection was both deep and intrinsic. That finding

¹¹⁸ Bianchi, ‘Human Rights and the Magic of Jus Cogens’ (n 19) 497.

corroborates the earlier conclusion that the category *ius cogens* is a corollary of the source of the State and of international obligation in the structural principle of self-determination, but the relationship between the protection of self-determination and the peremptory status of individual norms is still unclear. In particular, it remains to be seen whether a sufficiently deep connection to the protection of self-determination is enough *in itself* to confer *ius cogens* status on a norm (or, in other words, whether *ius cogens* norms are an expression of an *objective morality* in international law), or whether a connection to self-determination is merely *contributory to* the recognition of a norm as peremptory (in other words, that *ius cogens* norms serve as a *system morality*).

In order to examine that question, this section will consider a hypothetical *ius cogens* norm concerning poverty. If one is meaningfully to envision a system of *ius cogens* norms which exist to protect and to strengthen the individual and collective right to self-determination of people and peoples, one must include amongst its priorities the pernicious impact of poverty on the ability of individuals and groups to shape their own destinies in any meaningful sense. It seems clear, however, that there is no prohibition on poverty of *ius cogens* status in international law as it currently stands, and it will therefore be concluded that *ius cogens* norms are better characterised as a system than an objective morality.

5.1 Poverty and Self-Determination

There can be no doubt of the scale and intensity of the challenge poverty poses to the realisation of self-determination. Shue has described the right to subsistence as a ‘basic right’; a right without which one is not able to enjoy any other right.¹¹⁹ Gorovitz states the importance yet more starkly. The denial of subsistence, he says, is the ‘ultimate deprivation of rights, for

¹¹⁹ Henry Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy* (1st edn, Princeton University Press 1980) 18–19.

without food life ends, and rights are of value only for the living'.¹²⁰ Indeed, even where survival is not threatened, a partial lack of a basic requirement for subsistence (such as food) will have a devastating effect on individual capacity:

[W]ithout adequate nutrition, the value of rights is greatly diminished, for the rights that are most often claimed as human rights are those that facilitate growth, the development of personal capabilities, and the identification and pursuit of rational life plans. But malnutrition curtails growth, constrains physical and mental development, and limits the possibilities of action.¹²¹

Alston notes that it is 'hardly surprising' that 'the right to food has been endorsed more often and with greater unanimity and urgency than most other human rights', although he also notes the 'paradox[]' that it has 'at the same time [been] violated more comprehensively and systematically than probably any other right.'¹²² Shue notes that 'well over 1,000,000,000 human beings' fall below the bare minimum threshold he defines as 'basic',¹²³ 'everyone's minimum reasonable demands upon the rest of humanity',¹²⁴ 'the morality of the depths'.¹²⁵

Beyond this, however, it can be seen that extreme hunger (or profound lack of shelter, health care, or any other facet of poverty) is not merely an *obstacle* to the realisation of an individual's self-determination, but makes its actualisation impossible. Even at lower levels, where the lack of food, shelter, healthcare, or other want associated with poverty does not immediately threaten life, the imperative to continue to meet the basic survival needs of the individual and any family members or dependants constrains choice in action almost entirely,

¹²⁰ Samuel Gorovitz, 'Bigotry, Loyalty, and Malnutrition' in Peter G Brown and Henry Shue (eds), *Food Policy: The Responsibility of the United States in the Life and Death Choices* (Free Press 1977) 131–32.

¹²¹ *ibid* 132.

¹²² Philip Alston, 'International Law and the Human Right to Food' in Philip Alston and Katarina Tomaševski (eds), *The Right to Food* (Martinus Nijhoff 1984) 9.

¹²³ Shue (n 119) ix.

¹²⁴ *ibid* 19.

¹²⁵ *ibid* 18.

even leaving aside the debilitating effects on the body and mind of hunger, exposure, and illness.

The evils of this situation have been recognised by the international community on numerous occasions, and efforts to ameliorate it have been enacted in international law. The first reference to an international right to be free from poverty appeared in the Universal Declaration of Human Rights of 1948 (adopted without opposition by the UN General Assembly), which proclaimed at article 25(1):

Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.¹²⁶

This was further elaborated in the International Covenant on Economic, Social and Cultural Rights (ICESCR), which transformed the Article 25(1) UDHR statement of uncertain legal status into a definite legal obligation on States Parties to the Covenant. Article 11(1) declares:

The States Parties to the Present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.¹²⁷

The right to an adequate standard of living also appears or finds echoes in the Convention for the Elimination of Discrimination Against Women,¹²⁸ the Convention for the Elimination of

¹²⁶ Universal Declaration of Human Rights, UNGA Res 217(III) (1948).

¹²⁷ International Covenant on Economic, Social and Cultural Rights, signed 16 December 1966, in force 3 January 1976, 993 UNTS 3, Article 11(1).

¹²⁸ Convention on the Elimination of All Forms of Discrimination Against Women, signed 18 December 1979, in force 3 September 1981, 1249 UNTS 13, Article 12, 14(2).

Racial Discrimination,¹²⁹ the Convention on the Rights of Persons with Disabilities,¹³⁰ and the Convention on the Rights of the Child.¹³¹ These are usually interpreted as programmatic rather than absolute requirements, and although it would not be accurate to construe them as therefore non- or less-legal,¹³² it does indicate that no peremptory norm requiring States to tackle poverty is currently recognised in international law. That conclusion is corroborated by the conspicuous absence either of a positive or negative norm¹³³ concerning poverty in academic attempts to enumerate the category,¹³⁴ and nor can an *opinio iuris* be readily found in support of a norm of this status.¹³⁵

5.2 Systemic and Objective Morality

¹²⁹ International Convention on the Elimination of All Forms of Racial Discrimination, signed 7 March 1966, in force 4 January 1969, 660 UNTS 195, Article 5(e).

¹³⁰ Convention on the Rights of Persons with Disabilities, signed 13 December 2006, in force 3 May 2008, 2515 UNTS 3, Article 25, 28.

¹³¹ Convention on the Rights of the Child, signed 20 November 1989, in force 2 September 1990, 1577 UNTS 3, Articles 24, 27.

¹³² Asbjørn Eide, 'Economic, Social and Cultural Rights as Human Rights' in Asbjørn Eide and others (eds), *Economic, Social and Cultural Rights* (2nd edn, Martinus Nijhoff 2001) 24; Commission on Human Rights, 'The New International Economic Order and the Promotion of Human Rights: Report on the Right to Adequate Food as a Human Right Submitted by Mr. Asbjørn Eide, Special Rapporteur', 7 July 1987, UN Doc. E/Cn.4/Sub.2/1987/23, [66-69]; Jeremy Waldron, *Liberal Rights: Collected Papers 1981-1991* (Cambridge University Press 1993) 25, see further 212-213; Henry Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy* (2nd edn, Princeton University Press 1996) 159; Martin Scheinin, 'Economic and Social Rights as Legal Rights' in Asbjørn Eide and others (eds), *Economic, Social and Cultural Rights* (2nd edn, Martinus Nijhoff 2001) 29; GLH van Hoof, 'The Legal Nature of Economic, Social and Cultural Rights: A Rebuttal of Some Traditional Views' in Philip Alston and Katarina Tomaševski (eds), *The Right to Food* (Martinus Nijhoff 1984).

¹³³ The *ius cogens* norms listed above are negative prohibitions; limitations on State conduct vis-à-vis individuals and groups. An equivalent negative norm in relation to poverty might be, for example, a prohibition on impoverishment.

¹³⁴ Hannikainen (n 5); Whiteman (n 43); see also ILC, 'Draft Articles on the Law of Treaties' (n 43), commentary to Article 50.

¹³⁵ Rather, State pronouncements on poverty cast the tackling of poverty as a political goal (even a moral imperative), but not as a legal requirement. See, for example, the remarks of States on the occasion of the conclusion of the UN Millennium Development Goals: General Assembly, Official record, 55th Session, 7th Plenary Meeting, 8 September 2000, UN Doc no. A/55/PV.7; General Assembly, Official record, 55th Session, 8th Plenary Meeting, 8 September 2000, UN Doc no. A/55/PV.8; UNGA Res 55/2 (8 September 2000).

It seems likely, therefore, that no *ius cogens* norm concerning poverty has emerged. That conclusion excludes the possibility mooted above, that an imperative to protect self-determination is sufficient in itself to produce a norm of *ius cogens* status, and suggests instead that there must be a positive process of norm creation through recognition, ratification or acceptance of the putative provision by States. That contention is supported, too, by the formulation of *ius cogens* norms given in the Vienna Convention.¹³⁶ There is, though, something unsatisfying about such a process of norm creation, if the connection between the category *ius cogens* and self-determination is accepted. After all, the goal of protecting the self-determination of individuals and communities from the actions of States is vulnerable to severe retardation if States define the limits of the category. Nevertheless, it must be concluded that the Vienna Convention definition is likely to give an accurate account of the acquisition of *ius cogens* status, at least in practical terms. Although it is theoretically possible that a future Court or tribunal asked to consider the prohibition on impoverishment, for example, might choose to recognise it as having *ius cogens* status even absent recognition,¹³⁷ the primary means of enforcing peremptory norms, as with all other norms of international law, is the self and intra-community regulatory practices of States. For that reason, an unrecognised norm of *ius cogens* status is likely to be functionally equivalent to a non-existent norm.

It is clear, therefore, that a purely causal connection between self-determination and *ius cogens* status must be rejected, to the extent that it speaks of a new doctrine of naturalism, where the protection of self-determination is *in and of itself* sufficient to constitute a new norm of *ius cogens*. Rather, it seems that norms require some form of recognition by States before they

¹³⁶ Vienna Convention (n 6) Article 53.

¹³⁷ In which case it would be necessary to ask whether that tribunal was correct in its holding.

are capable of being actualised as having peremptory status.¹³⁸ It is thus more appropriate to characterise norms *ius cogens* as a system morality—a morality arbitrated by States—than as the manifestation in international law of an external or objective moral code. That conclusion is, however, somewhat unpalatable:

It is inherently difficult to accept the notion that states are legally bound not to engage in genocide, for example, only if they have ratified and not formally denounced the 1948 Genocide Convention. Some norms seem so basic, so important, that it is more than slightly artificial to argue that states are legally bound to comply with them simply because there exists an agreement between them to that effect rather than because, in the worlds of the [ICJ], non-compliance would “shock[] the conscience of mankind” and be contrary to “elementary considerations of humanity.”¹³⁹

That the connection is not necessary or automatic, however, does not indicate that no connection exists: it seems likely that self-determination is *contributory* to the formation of *ius cogens* status. The powerful connection to self-determination inherent in the prohibitions recognised as having peremptory status indicates a relationship between the two concepts, and that relationship seems significant given that it was concluded above that the concept of *ius cogens* itself is rooted in the structural concept of self-determination which runs through international law. *Ius cogens*, therefore, has both an intimate structural connection to self-determination, and a slightly weaker substantive connection. While that substantive connection guides the formation and selection of *ius cogens* norms, their peremptory status is constituted by the recognition, acquiescence or other endorsement of States. To that extent, *ius cogens* serves a similar function in the modern (still largely positivist) legal order to that of natural law in previous epochs; both constraining the actions and the legislative capacities of States to fit with the limits of acceptable conduct toward individuals and communities as

¹³⁸ A not dissimilar point is made by Bianchi, who refers to the constitutive function of the ‘conscience of the community’ that allows ‘human rights peremptory norms [to] form the social identity of the group as well as one of the main ordering functions of social relations’: Bianchi, ‘Human Rights and the Magic of Jus Cogens’ (n 19) 497.

¹³⁹ Martti Koskeniemi, ‘The Pull of the Mainstream’ (1990) 88 Michigan Law Review 1946, 1946–47. [Footnotes omitted]. To turn this sentiment on its head, D’Amato levels the charge at norms *ius cogens* that ‘when a putative treaty provision becomes so senseless that it is unimaginable that states would actually include it in a treaty (other examples being an agreement to exchange slaves or the right to torture each other’s diplomats), then *jus cogens* theory snaps into action to make sure that such senselessness, should it occur, would have no legal effect’: D’Amato (n 41) 4.

defined by the international community itself, and in parallel serving a system-building function that brings the international community in reality into being.¹⁴⁰ *Ius cogens* norms are the manifestations in positive legality of these ‘fundamental values’ of the international legal system.¹⁴¹

6. Conclusion

This chapter has reviewed the nature and foundations of *ius cogens*, and has argued that the category derives its high status from the structural importance in international law of self-determination. It reviewed the norms recognised as possessing peremptory status, and demonstrated that each has a connection to the protection of individual self-determination, collective self-determination, or of both, and that (with the exception of a scant few acts which can amount to war crimes, some of which are primarily of historical interest) those connections were in most cases deep and intrinsic.

That finding buttressed the conclusion that the concept of *ius cogens* itself is dependent on self-determination. It is a manifestation of the limits on the legitimate actions of States that is inherent in their natures as self-determining communities. It was argued in Chapters three and four that States are phenomena produced by self-determination, and that the sovereignty of States and their subjection to international law result from that nature.¹⁴² Obligation in

¹⁴⁰ This conception is consistent with Portmann’s observation that ‘although states play an important role in the process of creation of peremptory norms, their practice and individual wills cannot have the same weight as is the case with ordinary customary law’: Portmann (n 8) 262–63. [Footnotes omitted]. Janis, too, may be interpreted as offering some support for this proposition when he declares that the presumption that norms *ius cogens* are a subset of customary law rules is incorrect: Janis, ‘The Nature of Jus Cogens’ (n 53) 360. However, see *contra* Linderfalk, who consciously seeks to reclaim norms *ius cogens* for positivism by showing that they derive from customary law: Linderfalk, ‘The Source of Jus Cogens Obligations – How Legal Positivism Copes with Peremptory International Law’ (n 39) 372 *et seq*; see also Paust (n 92) 82.

¹⁴¹ Petsche (n 94) 258 *et seq*.

¹⁴² See above, p.141 *et seq*; p.196 *et seq*.

international law, it was concluded, is a direct result of the imperative need to protect the collective (political) self-determination of societies, and in particular of the generalisable claim each self-determination unit makes to the protection of its independence, integrity, and freedom from interference.¹⁴³ The same considerations—although here applied both to the accreted (collective) expression of self-determination and its root, the individual form—motivate the demarcation of certain limits to the acceptable conduct of States both in their external and in their internal affairs. It is these limits that are referred to as norms *ius cogens*.

It might be objected that this conclusion, if correct, would inevitably dictate the content of *ius cogens* norms, as well as providing the category,¹⁴⁴ but it was found that this is not the case. The example of poverty—an occurrence deeply destructive of self-determination but not subject to a norm of *ius cogens* status—was discussed, and it was concluded that although the category of *ius cogens* is derived from self-determination, the norms which populate it are positive rules of law created by States. Although the protection of self-determination appears to provide strong moral impetus towards the identification of a relevant norm as having peremptory character, the intervention (or, at a minimum, the acquiescence) of States still seems to be required in order to confer that high status upon it.

That conclusion may be seen as calling the connection between self-determination and *ius cogens* into question—why should the protection of self-determination be satisfied with the provision of an ‘empty box’?¹⁴⁵—but it is submitted that it does not invalidate the argument.

¹⁴³ See above, p.175-180.

¹⁴⁴ This is similar to an argument made by Weisburd, who argues that the lack of a meaningful way of determining what *ius cogens* norms are and ascertaining their content renders the category as a whole incoherent: A Mark Weisburd, ‘The Emptiness of the Concept of Jus Cogens, as Illustrated by the War in Bosnia-Herzegovina’ (1995) 17 Michigan Journal of International Law 1, esp. 25-27.

¹⁴⁵ Georges Abi-Saab, ‘The Uses of Article 19’ (1999) 10 European Journal of International Law 339, 341; Bianchi, ‘Human Rights and the Magic of Jus Cogens’ (n 19) 491.

The idea of *ius cogens* is an expression of the self-determination structural principle, and it is that which places it above the revocable consent of States. It is, however, as yet imperfect. As has been commented at various points throughout this discussion, the international legal order is not immutable, and nor is the process of its humanisation complete. This thesis has argued that the evolving concepts and conceptions of sovereignty, obligation, statehood, personality and relative normativity support the hypothesis that self-determination has been embedded at the deepest level of international law—as a structural principle—both by this process and as its driver. Only time will tell whether self-determination’s connection to *ius cogens* will be expressed in a causal or consequent relationship between the protection of the former and the status of the latter, but the emergence of such a connection would be a powerful additional indicator both of the humanisation process and of the centrality of self-determination to it. Rather than viewing the imperfection of the connection as a fault or defect, it is submitted that it is better viewed as an indicator of a process yet incomplete, and as a site for possible, exciting future developments.

In the meanwhile, need we be content with Abi-Saab’s optimistic, if minimal, thought that ‘be it an empty box, the category [is] still useful; for without the box, it cannot be filled’?¹⁴⁶ Bianchi provides a beautiful and evocative answer: hope is in there.¹⁴⁷ Hope certainly does dwell in the box, but it is not alone. It has been joined by a notion which, ever since 1776 and before, has again and again been shown to be one of the most compelling, enduring and profoundly human ideas of political thought. It has been shown to be an idea with a huge dialectical potential, and that is transforming the international legal system. In the field of *ius cogens*, the dialectical potential of self-determination has only just begun to be explored.

¹⁴⁶ Abi-Saab (n 145) 341.

¹⁴⁷ Bianchi, ‘Human Rights and the Magic of Jus Cogens’ (n 19) 493.

Conclusion

The Earth is a very small stage in a vast cosmic arena. Think of the endless cruelties visited by the inhabitants of one corner of this pixel on the scarcely distinguishable inhabitants of some other corner, how frequent their misunderstandings, how eager they are to kill one another, how fervent their hatreds. Think of the rivers of blood spilled by all those generals and emperors so that, in glory and triumph, they could become the momentary masters of a fraction of a dot.¹

The human person is the primary goal and end of the international legal system. That statement, in and of itself not apparently outlandish or surprising, is the conclusion of a number of scholars of international law who argue that the structure of the international legal system is changing. They identify an ongoing process of *humanisation*, a recognition or realisation of the individual as having interests which must be taken into account by the international legal order, and the consequent changes in that system of law. In the last years and decades Peters argues there has been a ‘massive increase of simple legal rights of the individual’ and a concurrent ‘operationalization of the individual’s duties’ which

[N]ot only have quantitative significance but are also an indicator of a *qualitative leap*. This qualitative leap lies in the fact that the practice and *opinio iuris* of acknowledging rights and duties on a large scale has at the same time crystallised – it is submitted here – an original (primary) international legal personality of the human being.²

¹ Carl Sagan and Ann Druyan, *Pale Blue Dot: A Vision of the Human Future in Space* (Random House Publishing Group 2011) 1.

² Anne Peters, *Beyond Human Rights: The Legal Status of the Individual in International Law* (Jonathan Huston tr, Cambridge University Press 2016) 551.

Simma argues, along similar lines, that ‘a rising awareness of the common interests of the international community, a community that comprises not only States, but in the last instance all human beings, has begun to change the nature of international law profoundly.’³

Odd though it may seem that the observation in the context of law—a human institution,⁴ a ‘social technique’⁵—created primarily by States—social facts,⁶ ‘metaphysical’ fictions,⁷—that individual human beings are the ultimate objects and beneficiaries of the system and its activities should be seen as unconventional or peculiar, it represents a fundamental challenge to the historical (or, at least, post-19th century) understanding of international law as an order comprised of and for States. Vividly metaphorised by Wolfers as billiard balls, the 19th century artificially conceived of States as opaque spheres the collisions and interactions of which were the proper subject of international law, and whose internal lives and the processes and individuals who composed them were dark to the external world.⁸ But the idea of international law’s humanisation goes further simply than acknowledging the indisputable

³ Bruno Simma, ‘From Bilateralism to Community Interest in International Law’ (1994) 250 *Collected Courses of the Hague Academy of International Law* 217, 234; see also Christian Tomuschat, ‘International Law: Ensuring the Survival of Mankind on the Eve of a New Century’ (1999) 281 *Collected Courses of the Hague Academy of International Law* 9; Theodor Meron, ‘International Law in the Age of Human Rights’ (2003) 301 *Collected Courses of the Hague Academy of International Law* 1; PK Menon, ‘The Legal Personality of Individuals’ (1994) 6 *Sri Lanka Journal of International Law* 127; Antonio Cassese, *The Human Dimension of International Law: Selected Papers* (Oxford University Press 2008); John King Gamble and others, ‘Human-Centric International Law: A Model and a Search for Empirical Indicators’ (2005–06) 14 *Tulane Journal of International and Comparative Law* 61; Ruti Teitel, *Humanity’s Law* (Oxford University Press 2011).

⁴ Nigel Warburton, Interview with Roberto Mangabeira Unger, ‘Roberto Mangabeira Unger on What is Wrong with the Social Sciences Today - SocialScienceBites’ (January 2014); Roberto Mangabeira Unger, ‘The Critical Legal Studies Movement’ (1983) 96 *Harvard Law Review* 561, 665 et seq.

⁵ Hans Kelsen, *General Theory of Law and the State* (Anders Wedberg tr, Lawbook Exchange 1999) 19.

⁶ John Searle, ‘Social Ontology and Political Power’ in Frederick F Schmitt (ed), *Socializing Metaphysics: The Nature of Social Reality* (Rowman & Littlefield Publishers inc 2003) 196.

⁷ Hersch Lauterpacht, ‘The Grotian Tradition in International Law’ (1946) 23 *British Yearbook of International Law* 1, 27.

⁸ Arnold Wolfers, *Discord and Collaboration: Essays on International Politics* (Johns Hopkins University Press 1965) 19 et seq; for further discussion of the analogy see Bruno Simma and Dirk Pulkowski, ‘Of Planets and the Universe: Self-Contained Regimes in International Law’ (2006) 17 *European Journal of International Law* 483.

sociological fact that States are comprised of individuals, that law is a product of human society, and that absent human beings these social institutions would cease instantly to be.⁹ It is not merely a descriptive claim, but one with normative force: it argues that individuals are, to a significant (and perhaps growing) extent the proper units of *concern* for international law, that they are subjects of the system, and that international law is (and should be) being reoriented to take account of their needs.

It is a change of that kind that is identified by Peters, Simma, Tomuschat and others as currently taking place in international law. Although their assessments of the scope and extent of the process differ (Peters's is perhaps the broadest), they each appear to regard that the change as fundamental—as occurring on a structural level and as deeply modifying the international legal system—and not simply as a skin-deep change in certain substantive rules. On the contrary: Tomuschat argues that the change can be characterised as a conflict between 'two rivalling Grundnorms'—sovereignty and humanity—the latter of which is striving to create a 'definitive new equilibrium' in which international law is individual- and not State-centred;¹⁰ while Teitel argues that there is a shift in the 'normative foundations'¹¹ of the system which has displaced sovereignty as the 'self-evident foundation for international law';¹² and Peters identifies a 'qualitative leap'¹³, arguing that 'this orientation towards the individual in (different, overlapping, changing) communities justifies international law as a whole.'¹⁴ This

⁹ Anthony Giddens, *The Constitution of Society: Outline of the Theory of Structuration* (Polity Press 1984) 24.

¹⁰ Tomuschat (n 3) 162.

¹¹ Teitel (n 3) 4.

¹² *ibid* 9.

¹³ Peters (n 2) 551.

¹⁴ *ibid* 553.

thesis has sought to contribute to and to advance this line of thought by offering an account of the ongoing process of humanisation at the theoretical level.

1. The Hypothesis

In its introduction, this thesis posited and defended two central claims, which served as axioms for the discussion that was to follow. With Giddens and others it was first argued that international law is a social order—an ‘observer dependent feature’,¹⁵ to use Searle’s terminology, which is created recursively through social action which recreates and reproduces the very ‘conditions that made these actions possible’¹⁶—which, as such, exhibits *modes of structuring*, or ‘structuring properties [which] allow[] the “binding” of time-space in social systems, the properties of which make it possible for discernibly similar social practices to exist across varying spans of time and space and which lend them “systemic” form.’¹⁷ The ‘most deeply embedded’ of these structural properties, Giddens calls *structural principles*.¹⁸

In the second place, the introduction to this thesis discussed the concept of self-determination. In its individual form self-determination was defined as the contention that all individuals should have the opportunity to decide upon and to pursue their own conception of the good, and it was argued that when individuals come together to form societies their individual rights to pursue the good accrete to produce an aggregated self-determination right of the society. That collective right was termed *political self-determination*, which represents in its internal aspect the right of the individuals in a political society to determine the form of the political

¹⁵ Searle (n 6) 196.

¹⁶ Giddens (n 9) 2.

¹⁷ *ibid* 17.

¹⁸ *ibid*.

system which applies to them, and in its external aspect claims that it is only the individuals within the society that can make that choice, and thus stands for the principle of non-interference.

Taken together, these form the starting hypothesis for the thesis as a whole: that self-determination, both in its individual and its collectivised forms, has become a structural principle of the international legal system, and its influence on the second order concepts of that system (the structural properties) produces effects which reorient them towards self-determination, and towards the human. It is here that the source of the humanising tendency in international law may be found.

This hypothesis was examined in two parts. Part one sought corroboration of the centrality of self-determination to the modern international legal system in the substantive law, and it analysed the history of self-determination and its manifestations in judicial decisions in order to demonstrate that the political form of the idea is treated as holding a privileged position in international law. Part two then considered the influence of self-determination on the structural properties of the modern legal system—sovereignty, obligation, statehood, personality, and *ius cogens*—finding that each has an intimate connection to self-determination in its personal or political form. The conclusions of these investigations are set out in more detail below.

2. Part One

Chapter one argued that self-determination, rather than being understood as a unitary or two-sided concept, should be cognised as a genus comprising four distinct “species” of self-determination ideas. These were identified as political, remedial, colonial and secessionary self-determination. Although these are connected ideas, an historical analysis indicates not

only that the legitimacy claims made by each form are distinct, but also that they should be given different statuses and treatment as a matter of international law. The chapter examined the development of self-determination through the major invocations of its various forms, and concluded that the long-standing uncertainties and apparent dissonances in the legal regulation of the norm can be explained by disaggregating the kinds of claims each makes. Thus, although the status of remedial self-determination is somewhat unclear, and although the secessionary form remains widely reviled, it is clear that self-determination of non-self-governing peoples in the colonial context has been established as a legal right under customary law.

Of most significance to the wider concerns of this thesis, however, is the position of political self-determination. That idea, it was shown, has long been invoked as a powerful source of legitimacy, appearing in the American and French declarations of 1776 and 1789; and in the modern day has been enshrined in the Charter of the United Nations and in UN practice as a deeply embedded principle of the post-Charter international legal order. Chapter two progressed this investigation further by examining the post-Charter development of self-determination in curial processes, finding that here too political self-determination has been treated as having a high status—it has been treated as a norm of *erga omnes* character¹⁹—notwithstanding that judicial processes have tended to treat remedial self-determination with a sceptical ambivalence and the secessionary form with outright suspicion.

These investigations of the substantive status of self-determination confirmed the hypothesis that the political form of the idea holds a central position in modern international law, but do not suffice in themselves to show that it has become the system's structural principle, or that

¹⁹ See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, (2004) ICJ Reports 136; and above, p.110-113.

it is the source of the humanising tendency that Peters and others have identified. In order to examine these aspects of the hypothesis further, part two considered the structural properties of the international legal system.

3. Part Two

In its introduction, this thesis argued that many or most of the structural features of the modern international legal system could be explained by reference to the influence and interaction of five key concepts, which it termed (following Giddens) the system's *structural properties*: sovereignty, obligation, statehood, personality, and *ius cogens*. Part two of the thesis examined these concepts in order to determine whether they exhibit a link to a sixth, self-determination, and in particular whether self-determination plays a part in their constitution and evolution. It was argued that such a link, if it was found to obtain generally across the five structural properties, would strongly indicate that self-determination is a deeper level concept of the international legal system, and is now a structural principle of the system.

Chapter three demonstrated that the doctrines of sovereignty and obligation often taken to be representative of the modern content of those concepts are not an inherent or immutable part of international law. Rather, these are concepts the meaning of which have shifted over time, and which have changed in particular in response to alterations in the foundations of the legal system. A significant shift was identified in the transition from the natural law of the 18th century to the positivism of the 19th, and it was here that the *problem of sovereignty*—or the apparent irreconcilability of the 19th century's expansive conception of sovereignty with international law properly-so-called—came into being. That 19th century concept of sovereignty was shown to be philosophically incoherent, and to perpetuate a normative conflict which reduces the practical and theoretical authority of international law.

By contrast, the chapter presented a conception of sovereignty and obligation as parallel and mutually supportive concepts which find their roots in the idea of self-determination. It was found that not only is a self-determination-based conception of sovereignty and obligation more internally coherent and better grounded, but that these are mutually reinforcing ideas and not, as the 19th century's conception is, in an irresolvable utopian/apologetic conflict. Furthermore, the polity-focused understanding of sovereignty and effective concept of obligation are consonant with a number of developments in the understanding of sovereignty discernible in the practice of courts, States and international organisations in recent years. Although this is not a homogenous picture, it seems eminently plausible that the ongoing humanisation of international law (which most authors describe as a gradual process) will produce an increasing number of instances in which this is so. It therefore appears that the concepts of sovereignty and obligation as they are now developing in international practice are more accurately described by a self-determination-based understanding, than by the 19th century's incoherent idea of illimitable State power, and it was concluded that in this area, in relation to a concept traditionally seen as the apogee of the State, it is not the State but rather the human which appears to be at the centre of the international law world.

Chapter four also emphasised the centrality of self-determination and of human individuals and communities to the ideas of statehood and personality. The chapter argued that the term "State" can refer to at least three distinct entities—the State(Polity), the State(Person) and the State-like functional subject of law—each of which has an intimate connection to self-determination. The State(Polity) is a social structure within which individuals conduct a shared socio-political life within a bounded space. It is a social fact, recursively created by the declarative actions of the individuals who live within it, and it engages both the internal and the external facets of the political self-determination of that community. Most significantly, it is a political self-determination unit for the purposes of the self-determination based conception of sovereignty discussed in chapter three, providing the necessary

understanding of membership for the proposition that interference with the internal processes of the polity by external actors (individuals and groups) is illegitimate. The State(Polity), too, is the basic societal unity within which a State(Person) may emerge. This second—co-extensive but non-equivalent—idea of “State” emerges where the necessary institutional structures exist to permit the collective entity (“the community” or “the group”) to act on its own behalf, in ways that are not mereologically attributable to the individuals who comprise it. In contrast to the State(Polity), which is passive, the State(Person) is an actor on the international plane which is appropriately a legal person in its own right. The creation of such a personhood was characterised as a self-determination process: a choice by the individuals inhabiting a State(Polity) to develop a *plenipotentiary rule*, or the institutional structures necessary to allow designated individuals to represent the community as a single entity.

Finally, it was argued that collective entities which lack a “true” personhood may nevertheless be subjected to international law as functional subjects. Like full personhood, that conclusion echoed the analysis of sovereignty and obligation conducted chapter three.²⁰ There it was concluded that the question of whether an entity is sovereign—defined as being entitled to independence and protection from external interference—is a factual question, based on whether a socio-political community exists such that the personal self-determination rights of the individuals who comprise it form an accreted, aggregated right to political self-determination. A political self-determination unit of that kind has a right to determine without external interference the principles on which its social and political life will be conducted, and the concept of obligation to law is therefore necessarily implied. Significantly, however, this analysis decouples sovereignty and international personality: it would be perfectly possible for an entity entitled to the protection of its sovereignty of the kind described here to be a State(Polity) which lacked a plenipotentiary rule, and therefore to be capable of being only an

²⁰ See above, p.141 et seq.

imperfect or functional legal subject. That it lacked full personhood would, however, neither justify withholding from it the protection of its sovereignty and its self-determination, nor of leaving unregulated whatever action-power it possesses, potentially to the detriment of other individuals and communities.

As with the concepts of sovereignty and obligation, the analysis presented in chapter four supports the proposition that self-determination is deeply embedded in the ideas of statehood, personality and subjecthood. That the concept plays such a vital role in shaping and conditioning these structural properties of the international legal system supports the hypothesis of this thesis, that self-determination should now be understood as the system's structural principle, and indicates that States are more correctly defined *as* and *for the protection of* self-determining communities rather than—as does, for example, Montevideo—simply as *containing* individuals. In reaching that conclusion, the chapter begins to break down the distinctions between the idea of “the State” and the individuals and communities which compose it.

Chapter five, finally, reviewed the nature and foundations of *ius cogens*, and argued that the category derives its high status from the structural importance in international law of self-determination. It reviewed the norms recognised as possessing peremptory status, and demonstrated that each has a connection to the protection of individual self-determination, collective self-determination, or of both, and that (with the exception of a scant few acts which may amount to war crimes, some of which are primarily of historical interest) those connections were in most cases deep and intrinsic.

That finding buttressed the conclusion that the concept of *ius cogens* itself is dependent on self-determination. It is a manifestation of the limits on the legitimate actions of States that is

inherent in their natures as self-determining communities. The chapter referred to the conclusion of chapters three and four that States are themselves phenomena produced by self-determination, and that the sovereignty of States and their subjection to international law result from that nature.²¹ Obligation in international law, chapter three concluded, is a direct result of the imperative need to protect the collective (political) self-determination of societies, and in particular of the generalisable claim each self-determination unit makes to the protection of its independence, integrity, and freedom from interference.²² The same considerations—although here applied both to the accreted (collective) expression of self-determination and its root, the individual form—motivate the demarcation of certain limits to the acceptable conduct of States both in their external and in their internal affairs. It is these limits that are referred to as norms *ius cogens*.

Chapter five then discussed the influence of self-determination on the substantive content of *ius cogens* norms, and it was concluded that here self-determination's influence operates at one remove. Although the category of *ius cogens* is derived from self-determination, and although the protection of self-determination appears to provide strong moral impetus towards the identification of a relevant norm as having peremptory character, the intervention (or, at a minimum, the acquiescence) of States still seems to be required in order to confer that high status upon it. *Ius cogens* norms are better characterised, therefore, as a system morality than as an objective morality.

The conclusions reached in chapters three, four and five support the hypothesis presented; that were self-determination now established as a structural principle of the international legal system, its influence would be discernible on the modern forms of the system's structural

²¹ See above, p.248-249.

²² See above, p.175-182.

properties – sovereignty, obligation, statehood, personality, and *ius cogens*. In each case, self-determination was found to be either the source of the structural property concerned—whether that be the manifestation of the community’s right to freedom from external interference in its status as a political self-determination unit, or the essential limits on the contours of international legality that arise from the character of law as a social technique to protect the self-determination of individuals and communities—or a vital element of the concept’s operation – for example in the self-determination process that creates the personality of the otherwise passive State(Polity). Two defects only were identified, neither of which is fatal to the argument presented.

First, it was found in chapter three that the progress of the self-determination-based concept of sovereignty has been questioned, and perhaps checked, by the resurrection of the *Lotus* doctrine by the ICJ in its *Kosovo* Advisory Opinion.²³ It was concluded, however, that a single event of this kind does not indicate a reversal of the direction of travel, nor that predictions of the demise of the 19th century’s concept of sovereignty were premature. Rather, backward steps of this kind are to be expected in an ongoing process of conceptual change, and particularly so in a decentralised system such as international law. Indeed, that the opinion’s revival of *Lotus* was so vociferously condemned as anachronistic—most notably by Judge Simma in his separate opinion—may on the contrary corroborate the contention that 19th century sovereignty is waning, and thus offer tangential support to the self-determination-based reading. Similarly, chapter five’s conclusion that substantive *ius cogens* norms are not formed as a direct result of self-determination but rather are mediated by States may be seen as calling the connection between self-determination and *ius cogens* into question—why

²³ See above, p.187-192.

should the protection of self-determination be satisfied with the provision of an ‘empty box’?²⁴ Rather than viewing the imperfection of the connection as a fault or defect, however, it was argued that it is better viewed as an indication of a process of structural change that is yet incomplete, and as a site for possible future developments.

It may therefore be concluded that the examination of sovereignty, obligation, statehood, personality and *ius cogens*—the structural properties of international law—supports the hypothesis of this thesis; that self-determination now sits at the heart of international law, and is a structural principle of the international legal system. That conclusion has important indications for the understanding of international law, and in particular supports the contention that international law is undergoing a process of humanisation.

4. Self-Determination and the Humanisation of International Law?

The analysis here suggests that self-determination has come to occupy a central position within the international legal system, and that its influence is altering the system in deep and important ways. The conclusion that the influence of self-determination is reorienting the basic concepts of the international legal system around the human individual and the right of the individual to self-determine, both personally and as part of a community, requires a shift in thinking about what international law is and how it works.

It indicates first, and most profoundly, that the individual is the true and ultimate subject of international law. States are rendered transparent, and the billiard ball fiction of the 19th

²⁴ Georges Abi-Saab, ‘The Uses of Article 19’ (1999) 10 *European Journal of International Law* 339, 341; Andrea Bianchi, ‘Human Rights and the Magic of Jus Cogens’ (2008) 19 *European Journal of International Law* 491, 491.

century will no longer serve: they are revealed to be fictional constructs composed of individuals in order to realise the purposes of individuals and individuals in community. They are not, however, diminished or rendered irrelevant: on the contrary, States are themselves expressions of individual and community self-determination and the interests and the purposes they serve are both necessary and important. Nevertheless, there are structural and necessary limitations on their action-competence and on the legalities they can define as a result of their intrinsic connection to self-determination, and they are axiomatically and ineluctably subjects of law, which coevolves with them in a process of mutual constitution.

Many or most of these conclusions will be familiar: they are the conclusions of the scholars who have observed and endeavoured to describe the process of humanisation of international law, and the similarities between them may be taken as some corroboration of the reality of the trend that they have chronicled. By providing a theoretical account of the changes to the deep structure of international law which both drive and are driven by these changes to the positive law in a recursive, fluvial process of social form- and reformation, it is hoped that it will contribute to the study of this important development in international law.

In so doing it has sought to follow Roberto Unger's injunction that study of the law (and other social sciences) must avoid 'a kind of retrospective rationalisation of what exists': a denial of 'the contingency of the arrangements [...] as well [as] our ability to change the quality of character of the structure' that means 'we produce superstition in the service of servility.'²⁵

Rather, he argues, the task of social science is

To radicalise the revolutionary insight; to explain the ascendancy of the present arrangements and the present assumptions in a way that dissociates explaining

²⁵ Unger interview (n 4).

them from vindicating their necessity or authority. And, in this way, insight becomes the ally of transformative ambition.’²⁶

In so doing it is likely to be able to claim only limited success. The process of reimagining the structure of international law will inevitably appear as tending towards the utopian, while the acceptance of certain structures (such as States) as the basic units of the system can very reasonably be criticised as implying their necessity, and reproducing ‘superstition in the service of servility.’ Where a choice has had to be made, however, it has tried to tend towards the actual rather than to the aspirational, and particularly so in its decision (discussed in the introduction) to examine those structures which can be discerned as pillars of the international legal system that currently exists, rather than to take as its task their re-evaluation or re-imagination. That choice could be criticised for its conservatism, just as the project as a whole (both of this thesis and of the wider study of humanisation) may be dismissed as utopian. Nevertheless, an attempt has been made to explain the real and in so doing to imply the ‘adjacent possible’: ‘[n]ot some horizon of ultimate possibles but the real possible which is [...] a penumbra of transformative opportunity’.²⁷ In so doing it has attempted to build a bridge between apology and utopia, and to offer a ‘utopian realism’.²⁸ International lawyers should not forget that our system is not merely *what happens*. International laws are not dispassionate occurrences after the manner of planets orbiting through galaxies of exploding stars: the system is *made and imagined*.²⁹ It can—and will—be remade and reimagined quickly, slowly, recursively, consciously, minimally and grandly, with ebb and flow and ebb

²⁶ *ibid.*

²⁷ *ibid.*

²⁸ Anthony Giddens, *The Consequences of Modernity* (Polity Press 1995) 154.

²⁹ This conclusion, reached from a different starting point, aligns closely with Koskeniemi’s characterisation of law as a socio-linguistic enterprise in which ‘human agents appear as conscious builders of the world’, albeit ‘within the possibilities offered by a historically given code’: Martti Koskeniemi, *From Apology to Utopia* (Cambridge University Press 2005) 11 *et seq.* There are echoes, too, in d’Aspremont’s work examining the role of the lawyer in the construction of international law: see Jean d’Aspremont, *Epistemic Forces in International Law* (Edward Elgar Publishing 2015); and further Jean d’Aspremont and Sahib Singh (eds), *Fundamental Concepts of International Law* (Edward Elgar Publishing, Forthcoming).

again, with good intentions and with ill. And it is humans who will stand at the heart of that process.

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